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THE
AMERICAN DECISIONS

CONTAINING ALL THE

CASES OF GENERAL VALUE AND AUTHORITY

DECIDED IN

THE COURTS OF THE SEVERAL STATES

**FROM THE EARLIEST ISSUE OF THE STATE REPORTS TO
THE YEAR 1880.**

COMPILED AND ANNOTATED BY

JOHN PROFFATT, LL. B.,

Author of "A Treatise on Jury Trial," etc.

Vol. II.

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AMERICAN DECISIONS.

VOL. II

In the selection of cases for this Volume the following reports have been examined and cases reported therefrom:

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PREFACE

The favorable reception and marked approbation given to the first volume of this series, and the decided indorsement given the plan by the judiciary, leading members of the profession, and the press generally, have stimulated me to do my utmost to render these reports worthy of the regard and favor thus manifested. The general plan of the work has been indicated in the introduction to the first volume, and that will be adhered to consistently and faithfully. As was stated there, particular efforts will be bestowed on the syllabus of the cases, in order to have it truly *mirror* the decision of the court. The profession are too well aware how deceptive, sometimes, a syllabus is; that either it leaves out a material fact on which the decision was based, or that it states a proposition too broadly where an important limitation should be made, and not seldom is a material point omitted.

The necessity and the utility of a careful revision of the syllabi will be very apparent by a comparison of some of the syllabi of this volume with those of the original reports. For the sake of illustration, I will here put in juxtaposition the syllabus in the case of *Ludlow v. Simond* :

[2 AM. DEC. 291.]

DISCHARGE OF SURETY.—Where a surety bound himself to make good a deficiency arising from a sale of goods consigned to the correspondent of the creditor, who had entire control of the consignment, a sale by the consignee at another place than that agreed on releases the surety.

JURISDICTION OF EQUITY IN MATTERS OF ACCOUNT.—Although there may be a remedy at law in matters of account, yet, if the relief be doubtful or inadequate, equity will entertain the bill, in order the more effectually to give relief generally.

EXECUTION OF SEALED INSTRUMENT BY SEVERAL.—Where several parties should unite in the execution of a sealed instrument, they may use and adopt the same seal.

[2 CASES'S CASES, 1.]

If a surety engage to make good the deficiency arising from a sale of goods at a given place, and consigned to the correspondent of the person to whom the security is given, who has the whole control of the adventure, a sale by the consignee at another place releases the surety. Though relief at law may be had, yet, if it be doubtful, equity will retain the bill.

This case, as will be seen from the note, is regarded as an important one on the obligation of a surety, and on the point of equitable jurisdiction. It will be observed that the syllabus of the original report very inadequately gives the point decided by the court in regard to the jurisdiction of equity. It will also be

seen that it omits a material point, in regard to the execution of a sealed instrument, which was raised in the case. And the case was cited on this very point in the 54th vol. N. Y. Reports, nearly seventy years subsequently; and it is also cited on the same point by Parsons on Partnership.

Again, in case of *Hare v. Fury*, the syllabus may be thus compared:

[2 AM. DEC. 358.]

RECOVERY OF MEANE PROFITS AGAINST JOINT-TENANT —Joint-tenants or tenants in common, recovering in ejectment, are bound to obtain possession under the proper writ or otherwise; and in case they neglect to do so, they will be limited to a recovery of meane profits to a reasonable time after judgment, which in this case was held to be a month.

[3 YEATES, 12.]

Generally, in trespass, the plaintiff may recover meane profits for such time as the defendant may have been in possession; but in the case of joint-tenants or tenants in common, recovering in ejectment, they are restricted to a reasonable time after judgment.

Here, it will be seen that I have omitted the general proposition stated in the original syllabus, because it was a principle necessarily assumed in the decision of the case, and about which there was no question; and it will also be seen that the original syllabus entirely omits a very important point, viz.: what reasonable time was held to be in this case. These are illustrative examples, showing how little dependence can be placed on the syllabi in some of the reports, and how often they fail to be a faithful index of the court's decision.

Again, it may be noticed how important it is to examine the subsequent modifications or limitations placed on cases which have been frequently cited in text-books and other authorities. This I regard as one of the most essential and useful features in a series like the present, and a most responsible duty for myself in the compilation and annotation of the cases. For example, the case of *Dusenbury v. Ellis*, 2 Am. Dec. 144, has been regarded as a leading case in New York, and generally cited elsewhere, on the personal liability of an agent; but it will be observed in a note to that case, that it has been, in recent decisions in the court of appeals of New York, construed and somewhat modified. So in regard to the case of *Seixas v. Woods*, 2 Am. Dec. 215; it has been for a long time cited on the doctrine of warranty in the sale of personal property. It will be found that late decisions in New York have materially modified the doctrine of that case.

It is noticeable in the present volume that there are a large number of cases on marine insurance, but this is very accountable when we consider the period when those decisions were made, which followed a great European war, out of which many important maritime questions arose; and the principles of our

law of marine insurance were then established by elaborate and learned decisions of our early judges, particularly those in New York and Pennsylvania.

I have to express my obligation to many members of the judiciary and the profession generally, for their kind suggestions, and in some instances for very material aid in the selection of important cases, and it is hoped in a short time that we may be able to have corresponding members in every state, to whom reference may be made for advice and suggestions.

J. PROFFATT.

SAN FRANCISCO,
March 1, 1872.

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AMERICAN DECISIONS.
VOL. II.

CASES
IN THE
SUPREME JUDICIAL COURT
OF
MASSACHUSETTS.

COMMONWEALTH v. HUTCHINSON.

[1 MASS. 7.]

COMPETENCY OF WITNESS IN TRIAL FOR FORGERY.—The person whose instrument is alleged to have been forged is not a competent witness to prove the forgery, unless the instrument said to have been forged is produced at the trial.

INDICTMENT for forgery containing two counts. The first charged the defendant with the forgery of a promissory note purporting to be made by one Samuel Castle, and payable to the defendant or his order; the second charged him with uttering and publishing the same. The defendant pleaded not guilty.

The *attorney-general, Sullivan*, being unable to produce the note on behalf of the prosecution, offered to prove by the testimony of three witnesses, that the defendant had shown them an instrument as described in the indictment, purporting to be the promissory note of Samuel Castle; that the witnesses read the same, and that the defendant offered to sell it as and for the genuine note of Castle; and that Castle was present and ready to testify that he had never made any promissory note whatever to the defendant; and he asked that Castle and the other persons might be sworn to testify on behalf of the prosecution.

Ives, for the defendant, objected to the evidence, unless the note was produced; he also objected to Castle as a witness, on the ground that the person whose note is said to have been forged is in no case competent to prove the forgery, unless he has a release or has paid the contents of the note.

The Court, STRONG, SEDGWICK, SEWALL, and THACHER, JJ.,* did not decide whether there might not be cases in which a forgery might be proved without producing the instrument alleged to be forged, but they were clearly and unanimously of opinion that the person whose instrument is alleged to have been forged is not a competent witness unless the instrument is produced at the trial.

And that although they believed it to be now settled in England that the person whose instrument is said to have been forged is not a competent witness to prove the forgery, yet the practice had for a long time been otherwise in this state, and from a supposed necessity; that is, from the impossibility ordinarily of proving the forgery without his testimony; but they had never known this done, unless the instrument was produced; that in thus departing from the decisions of the courts of law in England, which appear to have been grounded on pretty strong and substantial reasons, we have gone far enough, perhaps too far; that although they considered themselves bound by the decisions of our own courts, which were contrary to or different from those of the English courts, yet they thought to extend the principle beyond what had been already decided, to the length now contended for, would be very dangerous in its consequences; and that no reasons from necessity, convenience, or public policy required it.

The testimony of Castle being rejected, without which it was, in the present case, impossible to prove the forgery, the jury were directed to find the defendant not guilty, which they did instantly.

In *Commonwealth v. Snell*, 3 Mass. 82, it was held that upon the trial of an indictment for passing a forged instrument, when the instrument alleged to have been forged had been secreted to protect the offender, the person whose name was charged to have been forged, and who had seen and copied the instrument, was a competent witness to prove the instrument forged, and the production of the instrument itself was dispensed with.

The court in this case say: "The defendant's counsel cited the case of *Commonwealth v. Hutchinson*, where Castle, whose note was alleged to have been forged, was rejected as an incompetent witness, because the note was not produced. But in that case the witness had never seen the note, and the present court was informed by one of the judges present at that trial, that the ground of the decision was on the incompetence of the evidence under all the circumstances of that case, as it was admitted by the attorney-general that he had no other evidence."

* The court was composed of five members, Francis Dana, Chief Justice, Simeon Strong, Theodore Sedgwick, Samuel Sewall, and George Thacher.

COMMONWEALTH v. BAILEY.

[1 Mass. 62.]

DESCRIPTION OF FORGED INSTRUMENT.—In an indictment for forgery, alleging an instrument to be “in the words and figures following,” a strict recital is necessary; but the number of a bank bill and the marginal figures indicating its amount, not being parts of the bill, need not be set out in the indictment.

INDICTMENT of the defendant for uttering a forged and counterfeit bill of the Maine bank of five dollars. In this case it was alleged in the indictment that the forged bill was in the words and figures following, viz.:

“B. No. 237. Five dollars. The president, directors, and company of the Maine bank promise to pay N. Shaw, or bearer, five dollars, on demand. Portland, the seventh day of February, 1803. D. Hale, cashier, Sam. Freeman, president.”

The bill produced and offered in evidence had on it, between the words “five” and “dollars,” at the top, the representation of an eagle, with the figure five in it; on the left, just over the signature of the cashier, was the likeness of a fish with the figure five inscribed; and on the right margin of the bill was another figure five.

Ashmun, for the defendant, objected to the bill being given in evidence to the jury, on account of the variance, contending that as this indictment is drawn, a strict recital was necessary. The indictment undertakes to set out the words and figures of the bill; but the figure five, which is in three different places on the bill produced, and is used and intended to designate its denomination and amount, is wholly omitted in the indictment.

The Court, *DANA*, C. J., *STRONG*, *SEDGWICK* and *THACHER*, JJ., agreed to the principle contended for by the defendant’s counsel, but held that it did not apply to his case. They said that the number of the bill, and the words and figures in the margin, were not parts of the bill, but merely marks superadded for the convenience of the bank, or of the holder of the bill, and, therefore, not necessary to be set out in an indictment in any case. The whole bill, all that is evidence of a contract, is set out; and set out truly and precisely.

In the case of *Commonwealth v. Stow*, 1 Mass. 54, a strict recital was held necessary in an indictment for forgery alleging an instrument to be in the words and figures following. As confirming the principal case, see *United States v. Fidler*, 4 Bis. 59; *State v. Callendine*, 8 Iowa, 288; *State v. Briggs*,

34 Vt. 501; *Hampton v. State*, 8 Ind. 336; *State v. Carr*, 5 N. H. 367; *People v. Franklin*, 3 Johns. Cas. 299; *Griffin v. State*, 14 Ohio St. 55; *Commonwealth v. Taylor*, 5 Cush. 605. In the case of *Commonwealth v. Stevens*, 1 Mass. 203, the court again held that the number of a bank-bill, and the words at the top of it expressing its amount, need not be set out in the indictment for forgery, and cited the principal case as authority.

FORD v. KEITH.

[1 Mass. 129.]

RECOVERY BY SURETY AGAINST PRINCIPAL.—A surety is entitled to recover from his principal for money paid by the surety on behalf of the principal, on a usurious contract made by the principal, and although the latter might have avoided such contract.

ACTION of *indebitatus assumpsit* for money had and received, to which the defendant pleaded the general issue.

Whitman, for the plaintiff, stated the case as follows: That the defendant, David Keith, desiring to borrow money, authorized one George Keith, Jr., to procure it upon such terms as he thought proper, and to sign notes for said David Keith, for the payment of any moneys so procured; that George Keith accordingly borrowed of one Winslow a sum of money for the defendant, and executed a negotiable promissory note for the payment thereof, signed by the said George for the defendant, and also by the plaintiff and one Samuel Jones and the said George Keith; that Winslow indorsed the note to one Palmer, who demanded the contents of the present plaintiff, which he paid to Palmer, and brought this action against the defendant to recover the amount. The counsel conceded that the money was loaned upon a usurious contract, but contended that, as plaintiff had no knowledge of that fact at the time he signed the note, or when he paid its contents to the indorsee, it could be no objection to his recovery against the defendant.

Parsons, for the defendant, said that, according to the statement made by plaintiff's counsel, he was not entitled to recover in the present form of action; that the declaration should have been for money laid out and expended. The court being clearly of the same opinion, the plaintiff had leave to amend; whereupon counsel for plaintiff immediately added to the declaration a count for money laid out and expended. Defendant's counsel then objected to the plaintiff's proving any part of his case, because it appeared from his own statement that the money

was paid upon a void contract; but the court admitted the evidence.

It appeared in evidence that George Keith had general authority to make contracts for the defendant; that, at the time the money was borrowed from Winslow, defendant's necessity was so great that he told his agent to hire money at any rate; that defendant's agent had hired the money for which the note was given, upon a usurious contract made by him with Winslow. There was no evidence that the plaintiff knew of the corrupt agreement at the time of making the note; but it was testified that prior to paying the note to Palmer, George Keith had informed plaintiff that the contract was usurious.

Defendant's counsel made two points: 1. That the agent had no authority to bind his principal to an illegal contract; 2. That the contract being utterly void, and neither the principal nor sureties being bound to pay the note, the plaintiff, by voluntarily paying money upon a void contract, of which he had notice, could not compel the principal to refund.

Whitman, in reply, urged that the defendant did in fact authorize his agent to hire money at any rate, and although defendant might have disputed the note, yet he was not obliged to, and did not do so till this action was brought; that even if plaintiff knew the contract was usurious, still he ought to recover from defendant the sum paid upon a note executed for him, and at his request.

Strong, J., who charged the jury, after stating the case and the points in defense, said that as to the authority of George Keith to make a usurious or illegal contract, it was in evidence that he had a general authority to make contracts for his principal; and he thought it ought to be presumed that the agent made the contract which the principal intended; but whether it be so or not, shall the defendant say, as a defense to the present action, that he did not authorize his agent to make such a contract? He thought not. Then as to the notice to the plaintiff subsequent to the contract, and before he paid the contents of the note, what is the defense? The defendant says: "It is true the money was borrowed for me. I received it and had the benefit of it. I requested you to become my surety and sign the note, and you have paid the contents; yet, as I had a legal right to avoid the note, you shall not recover of me." Will the law permit the defendant to get rid of the present action on such grounds? He presumed it

would not. No man is bound to take advantage of a penal law, and avoid a contract which he ought in equity to perform. The plaintiff was under no obligation to dispute the payment of the note which he had given; and nothing could have excused the defendant but his giving express notice to the plaintiff that he, the defendant, himself did not mean to pay the contents of the note, and forbidding the plaintiff to do it; and this, he said, was the opinion of a majority of the court.

The jury found for the plaintiff.

STRONG, SEDGWICK, SEWALL and THACHER, JJ., present.

TERRY ET AL. v. FOSTER.

[1 Mass. 145.]

EXCLUSION OF CHILD FROM SHARE IN TESTATOR'S ESTATE.—Where a testator in his will makes such an allusion to a child as to show that he had not forgotten to consider such child in the distribution of his estate, it will be sufficient to exclude such child from a distributive share in the estate of the testator, and it is not necessary that the child should have a legacy in the will.

APPEAL from a decree of the probate court. The appellants were the grandchildren of Nathaniel Foster, deceased, who made his last will and testament on the seventh of May, 1791, at which time the mother of the appellants, Mrs. Terry, the daughter of the testator, was dead; the appellants claimed an equal proportion in the estate of their grandfather, the testator, as though he had died intestate, alleging that they had no legacy given them in the will. But the probate judge was of opinion that a legacy had been given them in the will, and decreed that the will should stand.

The appellees were the sons and principal devisees of the testator, and were appointed his executors, and charged with the payment of divers small legacies to his children and grandchildren.

After the usual preamble, the testator says: "As to my temporal estate, which God hath given me, after all my just debts shall be paid by my executors, whom I shall hereafter name, I give as followeth." He then devises his real estate to his two sons, the appellees; then follows a bequest to each of the children of his son John Foster, deceased. Then follows the clause upon which the question in this case arose, and which is in the following words: "Item, I give to my daughter Mary Russell

five dollars, and to my daughter Bushop five dollars, to my grandchildren of my daughter Terry, deceased, to be paid to them when the youngest of them come of age." He next bequeathed to his daughter Martin ten dollars, to his daughter Abigail a certain sum of money and an annuity during widowhood, and to his two sons, the appellees, his farming tools, and the stock on his farm, etc., to pay debts and legacies. Finally he appoints the appellees his executors and residuary legatees; and concludes by saying that "as he has now done what he thinks absolutely necessary for the good of his dear family, and for the peace and welfare of their temporal good and happiness, he recommends to them, as their dying father, to live in love and peace, etc., etc.

Attorney-general Sullivan, for the appellants, relied on the statutes of 1783, c. 24, wherein it was enacted, "that any child or children, or their legal representatives in case of their death, not having a legacy given him, her, or them, in the will of their father or mother, shall have a proportion of the estate of their parents assigned unto him, her, or them, as though such parent had died intestate; provided such child, children, or grandchildren, have not had an equal proportion of the deceased's estate bestowed on him, her, or them, in the deceased's lifetime." And he contended that the appellants had nothing given them in the will, and, therefore, were entitled, by the express words of the statute, to come in for a distributive share of the testator's estate, in the same manner as though he had died intestate.

Parsons, for the appellees, contended that there was a legacy given to the appellants; that the sum of five dollars was bequeathed to them; and that their case was not within the meaning and intent of the statutes. He cited the act of 12 W. III, chap. 7, sec. 2, passed in 1700, which enacted "that any child or children not having a legacy given them in the will of their father or mother, every such child shall have a proportion of the estate of their parents given and set out unto them as the law directs for the distribution of the estates of intestates; provided such child or children have not had an equal proportion of his estate bestowed on them by the father in his lifetime." But the preamble shows the intent and object of the enacting clause, and has uniformly been considered by the courts of law as limiting the same; it is as follows: "Whereas, through the anguish of the deceased testator, or through his

solicitous intention, though in health, or through the oversight of the scribe, some of the testator's children are omitted or not mentioned in the will, many children also being born after the making of the will, though in the lifetime of their parents." He argued that, considering both the preamble and the enacting clause, it was intended that it should appear from the will that the testator had not omitted any of his children from forgetfulness; and that naming the appellants in this case, showed that the testator had not forgotten them; it was immaterial whether he gave them anything or not. The act of 1784 did not repeal the former act; they were *in pari materia*, and should be construed together in deciding the case.

SEWALL, J. The question is, whether, under the statutes, the appellants are entitled to a portion of the estate of the testator, as though he had died intestate. This question depends upon the construction of the statutes on this subject, as applicable to that clause in the will in which the appellants are mentioned. The statute of 1784 is a revision of the ancient statute, but does not repeal it; they being, therefore, *in pari materia*, are to be considered and construed together; and although the act of 1784 omits the preamble contained in the first act, yet I think it ought to be considered as applying to the new statute. I am of opinion that any child or grandchild being noticed or mentioned in a will is sufficient, and that the statutes extend to cases of entire omission only. I am doubtful whether any legacy is given in this will to the appellants; but I do not think it necessary to decide that question; for whether there be or not, upon what I think is the true construction of the statutes, the appellants are not entitled to come in for distribution; and, therefore, the decree of the judge ought to be affirmed.

SEDGWICK, J. Upon looking into the will, it appears to have been made with great deliberation. The testator disposes of all his worldly property; expresses great solicitude and anxiety for his family; and he seems to have done everything for them which he thought it possible for him to do. To decide the question before the court, it will be useful to go back to the determination of the legislature on this subject. As the statute of 1700 was a new law, abridging the right which persons had to dispose of their property by will, it could not extend to grandchildren until the legislature had expressly declared it. Having declared it, the case of grandchildren is to be con-

sidered as coming within the reasons of the provisions. Those reasons are stated in the preamble, and ought, in my opinion, to limit and restrain the enacting clause, in the manner stated by my brother. I have no doubt that the law of 1784 was for the same purpose as the other statute, and that it was not intended to narrow the power of disposing of property by will, but left that power precisely as it stood previous to the statute. Look at the will. The grandchildren were not excluded from the mind of the testator. He had not forgotten them. He makes a complete disposition of all his property. This shows that he did not intend his grandchildren should come in for their equal proportion. I am not prepared to say that there is not a legacy given them; but, on the contrary, I am inclined to think there is, and that the sum is five dollars, that sum being mentioned and given to each of the testator's daughters named in the same clause with the grandchildren, the appellants. Whether this be so or not, I think, for the reasons given, that the appellants are not entitled to a distributive share, and, therefore, that the decree of the judge of probate must be affirmed.

STRONG, J. I concur with my brothers in the construction of the statutes, for the reasons which they have given. The testator did not forget his grandchildren. He mentioned them in his will. He could not, therefore, intend that they should come in for a share of his estate, as though he had died intestate. He intended to give them a legacy; and although he has obscurely expressed that intention, yet, if it can be discovered from taking the whole will together, the court will do it. It is obvious that he intended to dispose of all his property; most of it to his two sons and one favorite daughter, who had been, as he expresses it, a kind and tender nurse to him, night and day, in his long confinement. To his other daughters he gives small legacies. It is presumable that they had had nearly their share at the time of their marriage. But he intended to give something to his grandchildren, the appellants; and I think it may fairly be presumed that he intended to give them five dollars, they being the children of a daughter who had already received her portion; and these grandchildren of the testator being in the same reason with the surviving daughters who are mentioned in the same clause and under the same item, and to each of which daughters he gave five dollars. I think, therefore, that the decree of the judge of probate ought to be affirmed.

Decree affirmed.

LAWRENCE v. PARKER ET AL.

[1 Mass. 191.]

CONTRACT TO CONVEY LAND WITH WARRANTY.—A contract by three to convey land with warranty is not complied with by a conveyance with warranty by one of the three warrantors, and a release or quitclaim deed from the other two.

ACTION of covenant, in which the declaration stated that the defendants, Parker, Gilson and Blanchard, for a valuable consideration, on the eighteenth of March, 1799, duly executed their deed, obliging themselves to convey to plaintiff, on or before the last of April following, by a good and lawful warranty deed, certain tracts of land, and that Parker should procure his mother and wife to release their rights of dower in said tract, on or before the said last day of April, and that the premises should be free from all incumbrances; that if the defendants should not execute the deed as aforesaid, they would forfeit and pay to the plaintiff the sum of one hundred dollars. That said deed was never executed, nor said sum of one hundred dollars paid, though often requested.

The defendants pleaded in bar, that Parker did procure his mother to release her dower before the last of April, 1799, and that the premises were then free from incumbrances, and that Parker was sole seised in fee thereof; that being so seised, on the twenty-ninth April he made and executed a lawful warranty deed of the premises to the plaintiff, in which deed Betsey Parker, his wife, released her claim of dower in said premises; that on the same day, said Gilson and Blanchard did release and quitclaim all their right in the premises to the plaintiff, by their deed made on the back of the Parker deed; that this deed was tendered to plaintiff as a lawful warranty deed, according to the true meaning of their obligation, but that plaintiff refused to accept the same.

To this plea there was a replication and rejoinder, to which the plaintiff demurred, and a joinder in demurrer.

Parsons and Bigelow, for the plaintiff, said that the only question they should make was, whether upon a covenant by three to make a deed of warranty, the deed of warranty of one, with a release of the other two, be a substantial performance; and contended that, although the defendant Parker might have been sole seised as stated in the plea in bar, yet it was important that the other defendants should have united in the war-

ranty, as it was the fact of having able warrantors to indemnify him in case of eviction that induced plaintiff to enter into the contract.

S. Dana, for the defendants, contended that there had been a substantial performance of their obligation; that Parker was sole seised at the time he made the deed; and that it could never have been the intention of the parties that the two who had no interest in the lands should make a deed jointly with Parker.

The Court, DANA, C. J., SEDGWICK, SEWALL, and THACHER, JJ., were unanimously of opinion that the plea in bar was insufficient, on the ground that the warranty of one of the defendants, with a release of the other two, was not a performance of the covenant declared on.

BROWN v. AUSTIN.

[1 MASS. 208.]

LIABILITY OF PUBLIC AGENT ON CONTRACT.—When an agent is intrusted with the performance of a public duty, he cannot be held personally liable on any contract made by him in pursuance of such duty.

WRIT of error brought to reverse a judgment of the court of common pleas. The defendant in error, the original plaintiff in this suit, commenced an action of *assumpsit* against Brown before a justice of the peace, in which he declared that Brown was indebted to him in the sum of seventy-three cents, according to the account annexed, which sum the said Brown promised to pay; that at the special instance and request of Brown, Austin had traveled ten miles, and testified respecting the election of J. B. Varnum as a member of the house of representatives in the congress of the United States, which election was contested by Brown, before Nathan Cushing, Esq., one of the justices of the supreme judicial court of Massachusetts, who had been authorized by congress to take testimony respecting said election, and that Brown had promised to pay therefor what the plaintiff reasonably deserved; that he reasonably deserved seventy-three cents more.

The account referred to was as follows:

“ Aaron Brown, Esq., to David Austin, Dr. 1796, September 12. To travel ten miles, and attendance one day as a witness in the cause of the contested election of Joseph Bradley

Varnum, Esq., the said Brown being agent for the petitioners in said contest, \$0.73."

The general issue was pleaded, and upon the trial judgment was rendered that Austin should recover of Brown seventy-three cents and costs.

From this judgment Brown appealed to the court of common pleas, where, protesting that he did not make the promise as alleged by Austin, he further pleaded that he had been appointed the agent of the committee of elections of the house of representatives to take depositions concerning the election of one J. B. Varnum to the house of representatives of the congress of the United States, which election many citizens had petitioned to have investigated, as being illegal, and that in pursuance of such power as agent had caused Austin to appear and give his testimony before the judge, which was the same travel and attendance mentioned in Austin's declarations.

To this plea Austin demurred, on the ground that it amounted to the general issue, which should have been pleaded instead of the plea in bar. The court adjudged the plea insufficient, and the cause was tried on the general issue; whereupon the jury found for the plaintiff, Austin, damages to the amount of seventy-three cents and costs. A new trial was moved for and granted. Upon this second trial, the defendant, Brown, demurred to the evidence, but the court overruling the demurrer, and directing the cause to proceed upon the issue, the jury again returned a verdict for the plaintiff, Austin.

Brown then filed a bill of exceptions, stating that the court had permitted the plaintiff to give in evidence a certain paper attested by Hosmer, the sheriff, to prove that plaintiff had been duly summoned to appear before Nathan Cushing, the judge who took the depositions, to give evidence, as plaintiff had alleged, although defendant had objected that the proper evidence to prove that fact would have been a copy of the original summons certified by the judge, with a copy of the sheriff's return thereon.

Upon the writ of error brought to reverse the judgment of the court of common pleas, the following errors were assigned: 1. That the declaration is insufficient in law to maintain the action; 2. The same, in substance, as is stated in the bill of exceptions; 3. That the court upon the demurrer to the plea in bar, instead of deciding that the same was insufficient, as amounting to the general issue, ought to have ordered the same to be set aside; 4. That, as the defendant demurred to all the

evidence given in the trial, the plaintiff ought to have joined in demurrer; 5. That the matters given in evidence upon the trial were insufficient in law to maintain the issue on the part of the plaintiff, and ought not to have been left to the jury, but to have been so decided by the said court of common pleas; 6. The general error.

The defendant in error pleaded *in nullo est erratum*.

S. Dana, for the plaintiff in error, contended that from the declaration itself it appeared that Brown was merely an agent, and that if any action lay it ought to have been brought against the principal; that if this were not so, there was no evidence of an express promise by Brown, so as to charge him. That it was an incontrovertible rule of evidence that the best evidence which the nature of the case admits is to be produced, if possible, and that the best evidence of plaintiff's attendance before the judge who issued the summons would have been a certified copy of the original summons, with the sheriff's return. But it was contended that the great point in the case was, that an agent for the public is not liable to be sued upon contracts made by him in that capacity; and that Brown was such an agent was not denied.

Bigelow, for the defendant in error, contended that the services were performed at Brown's request, and that was a sufficient consideration for a promise; that the fact of Brown's acting as an agent made no difference, after verdict against him. If there was no evidence of an express promise at the trial, the objection ought to have been taken then; it is too late now; that when the services were rendered there was no act of congress making the nation responsible for expenses incurred in cases like the present; and from this a strong presumption arises that the parties understood Brown would compensate defendant.

THACHER, J. I have had no doubt from the first opening of this case. It appears by the record that the plaintiff in error was acting as the agent of the public. The law is settled that any person acting in that capacity, who makes contracts for the public—contracts in which he has no interest or concern other than as one of the individuals composing the body politic—does not render himself personally liable. The cases cited by the counsel for the plaintiff in error are express to this point. I think, therefore, that the judgment ought to be reversed.

SEWALL, J. I give my opinion upon only one point in this case, that of the public agency of the plaintiff in error. It appears by the record that Brown, in this transaction, was acting as agent for the public, in a business of great national concern. Whenever a person acts as agent for the public, he is not personally liable for contracts made by him in that capacity, nor will it make any difference if the services, etc., as in the present case, were performed at the special instance and request of the person so acting as agent; for although, in common and ordinary cases, the law implies a promise and personal obligation as necessarily resulting from services performed on request, yet such implication never arises where it appears that the request was made by a public-agent acting in a public concern. If the defendant in error has any claim, it is on the public; and it might have been, perhaps still may be, fairly presumed that the national legislature would provide for the payment of the witnesses summoned by the agent of the house of representatives.

SEDEWICK, J. It is, in my opinion, unnecessary to decide on the several errors assigned, because there is one conclusive on the merits of the controversy between the parties. But before I proceed to that, I would observe, that the court below was, in my opinion, manifestly wrong in admitting the evidence which they did of the existence and service of the warrant, by virtue of which, as it is said, the original plaintiff was summoned to appear before Judge Cushing. By that admission, the great and first principle of evidence, that the best evidence of which the nature of the case will admit, is to be required, was violated. No evidence was given that the warrant issued by Judge Cushing was lost or destroyed. It was therefore to be presumed that it was in existence, and if so, it certainly ought to have been produced. The security of all we hold dear in society renders it indispensable that the principle which has been stated should be adhered to, and never departed from. But if the judgment below should be reversed for this cause, the consequence would be that a *venire facias de novo* must be awarded. It is for this reason that the court have proceeded further in their consideration of the case.

The court is judicially informed that a number of the electors of the district for which Joseph B. Varnum, Esq., was returned as a representative to the house of representatives in congress, believing that he was not duly elected, had addressed the house, the constitutional and sole judges on that subject. The peti-

tion was received and considered, and the house, believing that further evidence was necessary to enable them to form a judgment on the question—a question in which the whole nation was interested—a momentous concern, not of individuals only, but of the public—provided the means of obtaining evidence. A judge was authorized to take it, and the plaintiff in error was appointed the agent to transact the business. This, then, was the business of the nation, originating in an order of the constitutional organ, and necessary to the performance of a trust of the most important nature, not of partial or local concern, but of universal interest. And who shall defray the expense necessarily incident to this transaction? Shall Mr. Brown, who was merely the agent of the public? Reason and justice forbid it. There is no doubt but that he, by an express undertaking, in his private capacity, to pay the original plaintiff, might have made himself liable; and in that case he must, for remuneration, have looked to the government. But there has been no such undertaking, nothing of that kind in this case. It is to be observed that this was before there was any act of congress on the subject, and the question of the liability of the plaintiff in error must be decided from the nature of the thing. I fully approve of the principles which governed the cases cited by the counsel for the plaintiff in error, by the former of which it was determined that an officer appointed by the government, treating as agent for the public, is not liable to be sued upon contracts made by him in that capacity; and by the latter, that a servant of the public, contracting by deed, on account of government, is not personally answerable.

DANA, C. J. The question referred to the court by this record is whether an individual who undertakes to act as agent for the public is personally liable upon contracts made by him in that capacity, and upon his request. In this case the subject was of general, national concern; all were equally interested, and it was the duty of every individual to give information on the subject. It has been said that the plaintiff in error was one of the petitioners to the house of representatives. If that be true, it does not make it his private concern. If Mr. Brown and the other petitioners really believed that the return was illegal, and that sufficient evidence could be adduced to prove the fact, it was their duty to make the representation to the house, the constitutional and only judges of the right to the seat, that the subject might be investigated. This was done, and the house appointed Brown their agent for that purpose. Ought it not to

be presumed that congress would make provision for defraying the expense arising from the investigation? Can it be supposed that the agent of the house was to be personally answerable for the expenses incurred in the performance of business done by their order? But it is said that the defendant in error performed the services at the request of Brown, and therefore Brown is personally liable. It is undoubtedly true that in a private, individual concern, services done upon request are a sufficient consideration, and the law implies a promise to pay for such services. That is not the present case; for, although it appears by the declaration that there was a request of Brown, yet it also appears by the record before the court that the service was rendered for the public. Considering the case in this view, that the business was of public, national concern (and the court give their opinions on this ground to prevent further prosecutions), I am of opinion that the action cannot be supported.

Judgment reversed.

Citing this case as authority, Kent, 4 Com. 632, says: "There is a distinction in the books between public and private agents on the point of personal responsibility. If an agent, on behalf of government, makes a contract, and describes himself as such, he is not personally bound, even though the terms of the contract might, in a case of a private nature, involve him in a personal obligation. The reason of the distinction is that it is not to be presumed that a public agent meant to bind himself individually for the government; and the party who deals with him in that character is justly supposed to rely upon the good faith and undoubted ability of the government. But the agent in behalf of the public may still bind himself by an express agreement, and the distinction terminates in a question of evidence."

SWETT ET AL. v. BOARDMAN.

[1 MASS. 253.]

PUBLICATION OF WILL.—Where a person, who was old and infirm, had submitted to him an instrument in writing, which he signed, and which was attested by three subscribing witnesses at the same time, but neither the deceased nor the witnesses gave any intimation at the time that the paper so signed was a will, it was held that there was no publication of the will in this case.

APPEAL from a decree of the probate court, establishing a certain instrument as the last will and testament of Offin Boardman, deceased.

The appellants were heirs at law of the deceased. The

appellee was also one of the heirs, and executor and principal legatee.

The appellants stated the following grounds of appeal:

1. That the deceased was not, at the time he signed the said instrument, of sound and disposing mind, but his mind was then greatly impaired and weakened by reason of old age and sickness; and,

2. That the said deceased, at the time of signing said instrument, supposed and believed it to be a common deed of bargain and sale for the conveyance of certain land, and did not know or suppose that the said instrument purported to be his last will;

3. That the said instrument and signature of the deceased thereto was obtained and procured by fraud and circumvention; and the said deceased, at the time of his signing the said instrument, being then of weak and unsound mind, was made and suffered to suppose and believe that the said instrument was a common deed for the conveyance of certain land; and,

4. That the said deceased never published the said instrument as and for his last will and testament.

The report of the facts in the case, by SEWALL and THACHER, JJ., who presided at the trial of this appeal, is as follows: "The appellants opposed the probate of a certain instrument exhibited as the last will of Offin Boardman, late of Newburyport, deceased, having appealed from a decree of the judge of probate establishing it, and having filed their reasons of appeal.

"The appellee, repelling and denying each of the reasons of appeal, exhibited this instrument for probate in this court. Two of the subscribing witnesses, and the deposition of a third subscribing witness, to this instrument were produced. From their testimony and the testimony of several other witnesses who were examined for the parties, and from the consent of the parties in some circumstances, the justices of this court, who sat in the trial of this appeal, have collected the following state of facts, viz:

"The appellee, who, in the instrument offered for probate, is named principal and residuary legatee and executor, went, in the lifetime of his father, about the twelfth of April, 1802, to a Justice Pike, and gave him certain minutes, according to which Mr. Pike was requested, by the appellee, to prepare a will for his father, the deceased Offin Boardman. One article of the minutes stated a bequest to the wife of the deceased, whereby one-third of his personal estate, and one-third of his real estate, for her life, were to be given her in lieu of her

dower. Upon these minutes, the instrument exhibited was prepared by Justice Pike, and about the thirteenth of April was delivered to the appellee. The instrument appeared conformable to the minutes, excepting that the provision was entirely omitted.

“According to the testimony of Justice Pike, this omission happened by his entertaining an opinion that the widow of the deceased would be entitled to the same provision as the minutes directed, notwithstanding the will.

“On the twenty-first of April, the appellee was seen at his father's. He passed by a resident in the same family, went abroad to two of the subscribing witnesses who lived or worked in the neighborhood, and applied to the other subscribing witness, a woman, who resided in a distinct part of the father's house. To each of these witnesses the appellee expressed a request to go to his father's house or room, and witness the execution of a deed. They accordingly attended. One of them, John Tufts, arrived before the others, and was with the deceased about five minutes during the absence of the appellee. Tufts, when he entered the deceased's room, saw a paper folded up lying on the table, and the deceased sitting about two yards from it. He asked the witness, at his going in, whether he was not named Tufts, and desired him to sit down. The other subscribing witnesses came in with the appellee, who immediately took a pen and put it in his father's hand, saying: ‘Now, sir, if you will sign it, or this.’ The deceased then rose from his chair, and taking it with him, placed himself at the table where the folded paper lay, and without reading or examining it, signed it with his name, being the instrument exhibited. The three subscribing witnesses then wrote their names upon the same paper, and at the same table, while the deceased remained at or near it. The instrument was left on the table. The deceased said nothing during the transaction. The subscribing witnesses had no notice that they had written their names to a will. Nothing was said at the time in their hearing of the nature of the paper which had been executed by the deceased. One of the subscribing witnesses suspected, from the circumstance of three witnesses, that the instrument was a will. The subscribing witnesses had no other conversation with the deceased, and could not testify as to any particular observation of the state of his mind, and almost immediately after the transaction withdrew from the room. The deceased at the time of this transaction was nearly eighty years of age. For more than a year pre-

ceding it, he had discontinued business, and had given up his concerns to his partner. For all that period, the deceased had been distressed with a painful swelling in his head, near his neck, of which he at several times complained that it almost distracted him; and he had been otherwise infirm and sick, was very deaf, abstained very much from conversation, and omitted reading his bible as he had been accustomed to do, especially at his family prayers. There was no evidence that within a month of his death he had been seen to read any book or writing. But in that period, the deceased conversed several times with his brother and his partner, who paid the deceased several sums of money, arising in the course of their business, upon statements made by the partner, but which the deceased did not attempt to examine.

“Some testimony was also received by the court from which it appeared that an application had been made to the deceased, by a Mr. Cutler, for the purchase of a piece of land belonging to the deceased, adjoining or parcel of his homestead, who agreed to sell it to him. Afterward, the deceased told Mr. Cutler that the land was wanted by his son, the appellee; and, on the eighteenth of April, two days before the execution of the supposed will, Cutler and the appellee were with the deceased, and it was concluded between them that Cutler should not have the land he had applied for, because the appellee had determined to become the purchaser of it from his father. On the twenty-sixth of April, on the Saturday next after the execution of the instrument exhibited, the supposed testator was more violently seized, became very sick, and on the twenty-eighth died.”

SEWALL, J. The only exception assigned in the reasons of appeal, which the court takes notice of, is the want of publication of the instrument as and for the last will and testament of the deceased. The question arising from the facts stated is, whether there has been a publication? I do not find any cases which have been decided expressly determining what amounts to a publication; but there must be proof that the person knew the instrument to be his will; that he intended it as such. In the case now under consideration, there is no evidence, excepting the signature of the deceased, of these facts. I do not think that any particular ceremony of publication is necessary or material; but the deceased ought at least to have known and understood that he was executing his will. There is no

evidence that he had any idea of that being the fact; but, as far as the evidence goes, it proves the contrary.

SEDGWICK, J. The statute 1783, c. 24, does not expressly require publication, nor is there anything to be found in the books directly in point on the subject. But, in my opinion, it ought at least to appear that the person knew he was executing his will, and that he communicated that fact to those who were called to attest the same as witnesses; and this is necessary to prevent imposition from the situation in which persons frequently are at the time of executing these instruments. In the present case, there are no circumstances—there is no kind of evidence that the deceased knew or supposed that he was executing his will, or that he even suggested it to the subscribing witnesses; but as far as a negative case can be proved, the reverse is proved, viz.: that he did not know or suppose that to be the fact.

DANA, C.J. No precise form of publication is necessary. There is one case in which it is said that where these words: "take notice," were used, it was sufficient. That was, in my opinion, carrying it a great way. That case, however, was not finally determined. But, in the case now before us, nothing was said as to what the deceased was doing, nor is there a particle of evidence that he knew he was executing a will; rather the contrary. The circumstances in evidence respecting the deed make it probable that he thought he was executing the deed. As to the minutes carried to Justice Pike, admitting the minutes were sent by the deceased, they were not followed. The devise to his widow was left out. But to go back, there was nothing said, nothing done, excepting barely the signature, which indicated an intention in the deceased to make a will. These circumstances, taken into connection with the advanced age and the then situation of the deceased, and his death shortly after, are conclusive to show that the instrument exhibited ought not to be established as his will.

Decree reversed.

This case came under the consideration of the court in a somewhat similar case, *Osborn v. Cook*, 11 Cush. 532, where it was decided that a will in the handwriting of the testator, and signed by him in the presence of three competent witnesses, who attested the same at his request, and in his presence, is well executed, although the testator does not declare to the witnesses and they do not know that it is his will. The court, referring to *Swett v. Boardman*, say: "The case was decided, and rightly, upon the ground that the testator did not know he was executing his will."

It should be remembered that the decisions were not made in reference to a statute requiring what is termed a publication; and where there is such a statutory requirement, a stricter rule would be held. It has been held, under such statutes, that there must be a distinct, unequivocal understanding between the testator on one side, and the witnesses on the other, that the instrument executed is a will; and this mutual knowledge must arise from something said, done or signified contemporaneously with the execution of the instrument: *Lewis v. Lewis*, 11 N. Y. 222; *Rutherford v. Rutherford*, 1 Denio, 33; *Peck v. Cary*, 27 N. Y. 9; *Gilbert v. Knox*, 52 Id. 125; *Thompson v. Stevens*, 62 Id. 634; *Den v. Milton*, 7 Halst. 70.

On this subject Redfield, 1 Wills, 214, says: "It would seem that no formal publication of the will is requisite to its validity; although Lord Hardwicke, in *Ross v. Ewer*, 3 Atkins, 156, regarded it as indispensable. But the later cases seem to have adopted the views of Lord C. J. Gibbs, that no other publication of a will is required than that a person shall declare that a certain paper is his act, and he desires it to be witnessed as such.

"In New York, where the statute expressly requires the testator shall publish and declare the paper as his last will and testament, and the subscribing witnesses do not recollect whether the prescribed formalities were complied with or not, other evidence may be received in regard to that point, and the fact that the attestation clause shows an enumeration of all the statutory requirements as having been complied with will not avail, if upon the proof it appears such was not the fact." Besides New York, the statutes in California, New Jersey and North Carolina require a publication or declaration by the testator, showing the instrument to be his last will.

LEWIS v. GRAY.

[1 MASS. 297.]

PAROL EVIDENCE OF A COLLATERAL AGREEMENT. — Where a conveyance was made by a debtor to his creditor, to sell the land to satisfy his claim, he giving to the debtor his note for the estimated balance that might remain after such sale, it was held in an action on the note between the parties, that evidence of a collateral parol agreement was admissible to show that any deficiency arising from the sale should be deducted from the amount of the note.

MOTION for a new trial. The action was on a promissory note bearing date April 24, 1800, for the sum of four thousand one hundred and twenty-two dollars and sixty-eight cents payable on demand; and the general issue pleaded. The cause was tried before DANA, C.J.

The execution of the note was not denied, nor plaintiff's right to recover; but the defense was, that one thousand five hundred dollars ought to be deducted from the face of the note by reason of certain transactions, stated by defendant's counsel as follows: That on the day of the date of the note Lewis was

indebted to Gray in the sum of five thousand three hundred and seventy-seven dollars and thirty-two cents, and to secure its payment conveyed to him certain real estate situated in Dorchester estimated at nine thousand five hundred dollars, which, exceeding the amount of the debt, the note now in suit was given for the balance by Gray to Lewis; that at the time of the conveyance it was agreed that Gray should sell the property, satisfy himself for the amount due him, and for whatever sum it should produce more than was sufficient for that purpose he was to account to Lewis; and if it fell short of the estimated value, it was to reduce the note according to such deficiency; that at that time the parties stated the following account, viz.:

<i>Dr.</i>	SYLVESTER GRAY in account with JACOB LEWIS.	<i>Cr.</i>	
1800.		1800.	
April 24. To sundry debentures amounting to..	\$11,892.86	April 24. By amount of two bonds for impost on cargo of ship Orion, from Isle of France....	\$17,230.00
Balance due on old account.....	9.82	Expenses paid John Davis, interest, etc.....	50.00
A house and land at Dorchester sold him this day.....	9,500.00	His note for balance.....	4,122.68
	<hr/>		<hr/>
	\$21,402.68		\$21,402.68
Errors excepted.			
Bosron, April 24th, 1800.		J. LEWIS.	

A similar statement of the account, reversing the articles of debit and credit was made and signed by Gray and delivered to Lewis. That afterward the plaintiff wrote the defendant the following letter: "Mr. Sylvester Gray: In consequence of what you signified to me when last together, I have thought proper to explain on paper that which was done verbally. Should the conveyance of property intended to serve you as collateral security, by any cause whatever, be reduced to a value inadequate to the demand which you hold against me, I hold myself accountable for the deficiency. I hereby acknowledge that the conveyance or sale of real property alluded to, namely: the Dorchester farm, was made with an intent to secure as far as the sum it may produce would go toward discharging a certain balance of accounts which I have already acknowledged to be due to you; and in case the said farm should sell for more than the sum due to you, it is understood the remainder is held subject to my order; therefore be it known to all whom it may concern, that the true intent of the sale already mentioned is herein set forth, notwithstanding whatever may appear to the contrary.

J. Lewis.

"Boston, January 20, 1801."

It was further stated that Gray sold said premises at auction for eight thousand dollars only, that being the most that could be obtained. Upon which, defendant's counsel, at the trial of the cause, contended that the letter, account, and the fact of the actual avails of the sale, were proper evidence to the jury to show that the plaintiff was entitled to recover the difference money only, viz.: one thousand five hundred dollars less than the sum of the note. The chief justice ruled that the evidence was inadmissible, and the jury found for the plaintiff the full amount of the note.

For the rejection of this evidence defendant's counsel moved for a new trial.

Dexter and Blake, against the motion, insisted that the evidence was inadmissible, because: 1. The deed from Lewis to Gray expressly stated a consideration of nine thousand five hundred dollars, and it is a rule that no evidence is admissible to contradict the consideration mentioned in a deed: 1 Bac. Ab. tit. Bargain and Sale, D.; 2. The admission of the evidence is against the statute of frauds, it being an attempt to prove a trust in lands by parol; 3. Parol evidence is inadmissible to vary a contract in writing; 4. There is no mutuality.

Parsons, in support of the motion, replied that the letter was not contradictory to the deed; it did not deny the consideration, but on the contrary, stated a valuable consideration. That the statute of frauds did not apply, as the trust was afterward reduced to writing, and if the defendant's answer confesses the statement of the plaintiff, it takes the case out of the statute: *Mountacue v. Maxwell*, 1 Str. 235. That the letter did not deny the note, but varied the sum to be recovered upon it, in case of certain contingencies therein mentioned. He further contended that the contract was one entire transaction, and that the subsequent writing, the letter, being evidence of as high a nature as the note itself, was admissible to show the whole contract.

THACHER, J., said he was in favor of a new trial on the ground that the letter and account stated ought to have been admitted in evidence in explanation of the contract between the parties at the time of making the note; that it was competent to the defendant to prove by the evidence offered that the whole contents of the note were not due; that it was the province of the jury to say whether the letter related to the note, and was to have the operation and effect contended for by the counsel for the defendant; if such was in fact the intention, the present verdict ought not to stand.

SEWALL, J. If the note upon which the present action is brought were a mercantile note, actually negotiated, I should be opposed to the admission of any evidence whatever, which might vary the sum originally recoverable upon it. The law has guarded the credit of notes which the parties have made negotiable, when actually negotiated, by rules established for the security of third persons not parties in the original contract: Kyd, 280. But these rules have never been applied, as I recollect, in cases arising upon bonds, written promises, or other contracts not negotiable or not negotiated, where the parties in the contract are the parties in the trial. The defense attempted in this case seems to have been in the nature of a set-off or counter-demand. To this purpose, after the origin of the note demanded, and the notice of the consideration for which it had been given had been shown by the defendant, he has attempted further to show that, by an additional agreement of the parties, made at the same time, corresponding with the other circumstances proved, and in a certain event then anticipated, which has since occurred, he is entitled to a deduction or discount from the note demanded. The deed of the Dorchester land, and the amount stated upon the estimate, which became the consideration of that sale, concur in establishing the note declared on by the plaintiff. And, as I apprehend, it is not inconsistent with the note, or with the other part of the evidence for the defendant to show that the estimate or price of the Dorchester land, forming an important part of the account stated, and resulting in the note declared on, had been conditionally assented to by the parties. The note, as the ground of this action, remains entire according to the tenor of it; but the sum recoverable upon it may be varied, according to an additional agreement of the parties. It has been objected that the admission of evidence to this effect would be contrary to the general principle or rule, that written contracts are not to be varied by parol testimony: 3 Wils. 276. This principle of law cannot be questioned; and if it applies in this case, the defect in the mode of proof is not supplied by the after-writing of Lewis, which makes no part of the original agreement. My opinion, resulting from the view which I have suggested of this case, is that this principle does not apply where the evidence objected to is of a collateral agreement offered in mitigation of the damages recoverable upon the original contract. The evidence which was rejected in this case is similar, as I apprehend it, to evidence of a partial payment, accord and satisfaction, or other

discharge of a written contract, which may be received from parol testimony: 2 Lev. 81, 144; Bull. N. P. 152, 153.

It has been further argued that the evidence offered was insufficient, not being in writing; because the collateral agreement proposed to be proved was a bargain or trust respecting lands, and therefore within the statute of March 10, 1784, or an agreement within the statute to prevent fraud and perjury.

As to the first of these objections, I do not perceive that the proposed agreement had any relation to the sale of the Dorchester land, though grounded on the price or estimate taken as the consideration of the sale. That bargain was completed at the time, and will not be affected by any event of the present case. And as to the second of these objections, the only clause of the statute of frauds which has any apparent application in this case, is that requiring all agreements, which are not to be performed within one year from the making thereof, to be in writing. The construction of that clause has been that only such agreements are within it, as are expressly limited for the time of their performance beyond one year. Str. 506; Salk. 280. In the agreement attempted to be proved, there was no limitation of the time of performance. However, if the supposed agreement may be considered as within either of the statutes mentioned, I am of opinion that the after-writing of Lewis supplies this defect, so far as to take the case out of those statutes, upon the authority of the case cited by the counsel for the defendant, from Strange's Reports. Upon the whole, I think that the evidence of this collateral agreement, and especially the statement of it by the letter of Lewis, the plaintiff, ought to have been admitted to the jury; and that there must be a new trial, that this evidence may be considered in the defense.

SIDGWICK, J. This case comes before the court on a motion for a new trial. The facts appear in substance to be that the plaintiff being indebted to the defendant in a considerable sum of money, an account was stated between them, and the balance struck; that it was agreed that a real estate in Dorchester, which was estimated to be worth nine thousand five hundred dollars, should be conveyed by the plaintiff to the defendant; that taking it for granted that the estate was of the estimated value, there would then be a balance in favor of the plaintiff to the amount of the note, and that for this balance the note should be given; that in pursuance of this agreement the deed was executed and the note given. At this time no other writing

passed between the parties; that at the trial a letter of the following tenor [the judge then read the letter] was offered and rejected; and it was stated that evidence would be given that the land did not produce on the sale more than eight thousand dollars; and said that the difference between that sum and nine thousand five hundred dollars, at which the land was received by the defendant, ought to be deducted from the note. If this rejection was right, the verdict ought to stand; otherwise there must be a new trial. The counsel for the plaintiff has stated five reasons why the evidence offered by the defendant ought to have been rejected: 1. That it went to contradict the consideration expressed in the deed, which is nine thousand five hundred dollars. To this I answer that it is not an attempt to contradict, in any sense, the consideration expressed in the deed; so far from it that the deed is in no sense in question in this action; 2. The second reason was, that this is against the statute of frauds; setting up a parol agreement to raise a confidence or trust out of lands. To this again I answer, that there is no claim whatever by it, formed on the land or anything out of it. The third reason given was, that it was an attempt to control, against the principles of the common law, written by parol evidence. To this I say, that the letter is as much written evidence as the note, and, whether written at the time or afterward, it as much avoids, in the one case as in the other, the mischief intended to be guarded against by the establishment of the principle alluded to in the objection; and which principle I admit in its full extent. Again, it was said that the letter is not relevant. It is certainly susceptible of explanation; but it speaks of a conveyance of property by the plaintiff to the defendant; that this property lay in Dorchester; and it is agreed that the property for which the note was given does lie in Dorchester; it speaks of an account, which account was produced, and which mentions such a note as that on which the action was brought. All this appears to me to be good *prima facie* evidence to be submitted to the jury. It was again objected that there is no mutuality between the parties; that if the land should have sold for more than was justly due to the defendant, the plaintiff had no means of recovering the surplus, he having, as it is said, no written contract for that purpose. This objection at first had considerable weight with me; but I do not know that it was certainly to be concluded that the plaintiff had no writing from the defendant; and I think there is some reason to doubt whether, if he trusted to the personal

honor of the defendant, he ought to be permitted for that reason to violate his own honest contract. I am of opinion that a new trial ought to be granted.

STRONG dissented.

DANA, C. J., gave no opinion, as a majority of the court was in favor of granting a new trial.

New trial granted.

HARRIS v. CLAP ET AL.

(1 MASS. 303.)

AMOUNT RECOVERED BEYOND PENALTY IN BOND.—Interest beyond the penalty of a bond may be recovered in the form of damages, and this even against a surety on the bond.

ACTION of debt on a bond bearing date the third of November, 1797, in which the defendants were jointly and severally bound to the plaintiff in the penal sum of five thousand dollars. In the bond there was a condition, stating that said Harris and Clap had mutually chosen A. B. and C. to arbitrate, determine and award between them in reference to certain matters which were stated in writing and annexed to the agreement of reference respectively acknowledged by them before a justice of the peace; and that if said Clap should truly perform the award of the arbitrators, or a major part of them, and pay to Harris such balance or sum of money as should be awarded to him, within one hundred and twenty days after making such award, with interest thereon after said one hundred and twenty days, then the said obligation to be void; otherwise to remain in full force.

Having heard the parties, the referees awarded that Clap should pay to Harris the sum of four thousand six hundred and eighteen dollars and sixty-two cents, in full satisfaction of the demands submitted, which award was returned to and accepted by the court of common pleas, at the January term, 1798, and judgment rendered in favor of Harris and against Clap, for that sum with costs. At the next term of this court, Clap petitioned for an order of review; the report was recommitted to the same referees, but one of them refusing to act, the order was rendered ineffectual. Upon a resolve of the legislature authorizing this court to grant a review if they thought proper, it was determined that no review should be granted. The defendants thereupon confessed the forfeiture of the bond declared on, and the question before the court was, what sum plaintiff was entitled to recover.

Parsons, for the plaintiff, contended that he was entitled to recover the sum awarded, with interest, after the expiration of one hundred and twenty days from the time of the acceptance of the award by the court of common pleas; that though this amount would exceed the penalty, yet the court could give judgment for the penalty, in debt, and for the excess, in the name of damages for the detention of the debt: *Lord Lonsdale v. Church*, 2 T. R. 388, and the cases cited. That the cases in which the courts have refused to go beyond the penalty, are those of bonds conditioned for the performance of a collateral act, in which the party had no certain measures by which he could determine what sum he ought to pay. That the time of making the award had been ascertained, by its acceptance by the court of common pleas, and that interest ought to be computed from the expiration of one hundred and twenty days from that time.

Attorney-general Sullivan, for the defendants, insisted that there was no case in which a surety had been held for an amount beyond the penalty, whether the bond was conditioned for the payment of a sum of money, or for the performance of a collateral act; that the award had not been fixed and accepted by the court until the present term; that there was no obligation on the surety until the time that the award had been ascertained by the court, and that in no event ought the surety to be compelled to pay an amount exceeding the penalty.

TEACHER, J., said he had no doubt that the court might go beyond the sum of the penalty of a bond, by allowing as damages for the detention of the debt the interest upon the penalty; that in the present case he was of opinion the award had its force from the acceptance of it in the court of common pleas, and judgment there upon it; that as that judgment would draw interest, so also ought the bond after one hundred and twenty days had expired from the rendition of the judgment.

SEWALL, J. The question for the consideration of the court is, whether judgment may be entered for an amount exceeding the penalty of the bond. The condition of this bond is, to pay such sum as should be awarded by referees appointed by the plaintiff and Clap, the principal in the bond, for the adjustment of certain demands between them, within one hundred and twenty days after the award should be made. A certain sum was awarded to Harris to be paid by Clap, which award, being returned into the court of common pleas, was there ac-

cepted and confirmed by a judgment of that court rendered thereon. The plaintiff has been delayed until this time from having the effect of that judgment by an attempt to review the action, which attempt, by a decision at this term, has entirely failed, and he now prays judgment on this collateral bond. In ordinary cases, where the amount would be short of the penalty, the judgment would be entered for the sum awarded with legal interest thereon from the time of payment, according to the intent of the condition; and affording to the obligor the benefit of the chancery powers of this court, pursuant to the statute in such case provided. In the present case the sum awarded and interest upon it from the time of payment exceeds the penalty, and hence the present question of the extent of the sum for which judgment may be entered. This court, especially in a case where a surety may be affected, cannot exceed the express contract of the parties and the legal effect of it. At the common law the penalty of a bond is recoverable, with damages, for the detention of it from the demand or other time of payment. The penalty is recoverable by the express contract of the parties; and the damages, estimated at the lawful interest of the penalty, are the legal effects of their contract. To this amount, then, the obligors in a bond are liable at law; and this court are not authorized by the statute to mitigate or abate this sum, unless it exceed the sum due and the damages actually sustained by the plaintiff. In this case the amount awarded by the referees, and interest thereon from the time of payment, is due from Clap, one of the obligors, according to equity and good conscience; but in this suit the plaintiff cannot recover beyond the penalty of this bond and the damages for the detention of it, which may be considered as legally demanded at the service of the writ. The penalty and interest from the demand must be the measure of the judgment, not exceeding, however, the sum awarded and interest upon it from the time of payment, according to the condition of the bond. And the judgment must be entered for that amount, viz: five thousand dollars, as recovered for the debt, and the residue as damages for the detention of the debt.

SEDGWICK, J., dissenting, after stating the case, and observing that the amount of the award in favor of Harris, with interest thereon, computed from the end of one hundred and twenty days, from the time it was accepted by the court of common pleas, greatly exceeded the penalty of the bond. The

question is whether the excess, beyond the penalty, can be recovered in the name of damages. And I am of opinion that it cannot. Were the action solely against Clap, the principal, the question in equity, and as I conceive, in law, would be wholly different. At the time the submission was made to referees, by Harris and Clap, the surety had no means of knowing, it was impossible he should know, what amount would probably be awarded against his principal. To the amount of five thousand dollars he was willing to be responsible, but no further. And yet, if the sum awarded against him by our judgment be more than the penalty, he will, without any fault of his, without any practice of delay on his part, and merely in character of surety, be made responsible to a greater amount than he ever consented to assume. Barely stating the facts presents, to my judgment, so strong a case that it is incapable of being fortified by arguments.

I have said that the surety was in no fault; that he had practiced no delay. He never undertook to pay, but on the contingency of an award against his principal; and it is agreed on all hands, and was admitted by the counsel for the plaintiff in the argument, that the award would not create any obligation upon him until it was established by the court. Till this term of this court it never was established; for although it was accepted by the court of common pleas, yet it was so removed to this court that no execution could issue on the judgment. Can it in any sense be said that while the judgment was so suspended, and its validity a question depending and undecided before the supreme court of judicature of the commonwealth, the surety was in fault for not deciding what has remained here for years undecided? Let it be again remembered that this suit depended altogether on that upon the award, and that unless that was decided against the principal, there never could be a recovery against the surety. But it may be said that this defendant might have brought the money into court to the amount of the award, and that he ought to have done it if he would excuse himself from the payment of damages. To this there are two answers. In the first place, that there was nothing due until the award was accepted, and that acceptance rendered valid and effectual by the decision of this court; and in the second, that by bringing the money into court, this defendant would have admitted the plaintiff's action to the amount of the sum so brought in; and, of course, had the award been set aside, the payment would have been in his own wrong.

Thus far have I gone on principle; but I had thought that this case was decided on authority. I had supposed it had been long settled that a surety was never to be bound beyond the express terms of his contract. Many decisions to that purpose might be produced, but I will cite only one, which I conceive a very strong one: In *Stratton v. Rastal*, 2 T. R. 366, it was determined, that "where an annuity bond granted by two becomes void, by the neglect of the grantee in not registering a memorial under the statute, he cannot recover back any part of the consideration money from the one who was known only to be a surety for the other, and had in truth not received any part of it, notwithstanding they both signed a receipt for it." In that case it appeared, from the whole of the transaction, that the plaintiff had no confidence in the principal, but relied wholly on the surety. Yet it was determined that the action could not be supported. And that great judge, Buller, laid it down as undoubted law that against a surety a contract cannot be carried beyond the strict letter of it. Now, in this case, the surety never undertook beyond the penalty of the bond; he has practiced no delay. Till within a few days he did not know, nor could he know, unless he was wiser than those who are to pronounce the law, that the contingency had happened, or ever could happen, whereby he had, or ever should, become indebted to the plaintiff.

From every view which I have been able to take of the subject, I should have concluded with confidence, but for my respect for those from whom I have the misfortune to differ in opinion, that the plaintiff's demand would have been bounded by the amount of penalty of the bond. Whether I am right or wrong, I cannot resist the impression that the case of the surety is indeed a hard one, inasmuch as he is to be mulcted in damages for not knowing a fact resulting from principles of law, that the contingency had happened by which a duty had devolved on him, while it was a question which had induced an interference of the legislature, and while the decision of the question was suspended in this court.

STRONG, J. In this case one question is: At what time did the sum awarded by the referees become due? Was the award binding from its acceptance in the court of common pleas, or does its validity depend upon a decision of this court a few days since upon the application of Clap to review the judgment of that court? I am of opinion that the award is to be considered as having its force and validity from its acceptance in the court below.

It is true that the principal has ever since been resisting the payment of the sum awarded, and endeavoring to get the judgment of the court of common pleas annulled or reversed. He has made his application to this court for that purpose; he has been fully heard, and we have, at this term, unanimously determined that the application was groundless; that he had no reason to contend. It appears, therefore, that the principal has been all this time acting in his own wrong. The next and principal question then is: What damages shall the plaintiff recover? Shall he recover the sum awarded with interest, after one hundred and twenty days, from the time of the acceptance of the award in the court of common pleas, or are the court limited to the sum of the penalty of the bond? It has been said that although the court may in some cases give interest by way of damages beyond the penalty of the bond, yet that it cannot legally be done against a surety. I admit that there are cases in which a difference has been made between the obligations of the principal and the surety in certain contracts; but I do not think this to be one of those cases; nor can I see the distinction which my learned brother has taken in the case. Here both the defendants have bound themselves, jointly as well as severally, in the same words in a penalty. If the words are sufficient, in case the action had been brought against the principal alone, to have authorized the court to go beyond the penalty of the bond in a judgment against him, then surely the same words must be sufficient for a like purpose in the present action; and to say that they are not, seems to be absurd. What, then, is the law as to going beyond the penalty? The law, as I understand it, says that every man who binds himself in a penalty is liable to pay not only the whole penalty—the debt—but also the legal interest of it, as damages for the detention. This rule of law extends to all cases where the condition of the bond is for the payment of money—or where the value of the condition, if I may so express it, is equally capable of being ascertained as though the sum had been expressed in the condition—which is the present case. When the surety entered into the bond, he knew, or he ought to have known, that he was bound to that extent. Every man is presumed to know the law. He undertook that the principal should perform the award; this was the contract made by the surety; the award has not been performed, and, therefore, the defendants must answer in damages for the non-performance; these damages are the amount of the sum awarded, with the interest thereof, after the expiration of

one hundred and twenty days from acceptance in the common pleas; and the plaintiff is entitled to judgment for that amount in the manner already mentioned.

DANA, C. J., after stating the cause, said: At the time of executing the bond it was uncertain what sum, if any, would be awarded against Clap; this was made certain by the award, that is, by the acceptance of it in the court of common pleas; for, till then, it was uncertain whether it was a binding and valid award or not; by that acceptance it became binding upon the parties, and the duty of the defendants in this action was created. What is that duty? That Clap should perform the contract entered into by the bond, which was to pay to the plaintiff whatever sum should be awarded to him within one hundred and twenty days after the making the award, which, as I have already observed, is one hundred and twenty days after the acceptance; the act of the court in accepting the award being necessary in this case to make it a binding award. It was the duty of the principal to have paid the actual sum awarded at the expiration of the one hundred and twenty days; the money has not been paid, and the surety comes into this court as a court of equity for relief. What is the equity of the case? Clearly that the plaintiff should recover the sum awarded and interest. But, it is said that we cannot, against a surety, go beyond the penalty of the bond; and the case of *Stratton v. Bastal* has been cited to prove it. That was a case where the equitable action for money had and received was brought to recover back money paid upon a consideration which failed, and it appeared in evidence that the surety had not, in fact, received a farthing of the money. The action was grounded wholly upon an implied promise, and the court decided, and, undoubtedly, very justly decided, that the surety was not liable; and I agree that a surety is not, in any case, to be bound beyond the fair import and intention of his contract. In the case now under consideration, the surety has expressly, by an instrument under seal, bound himself to the plaintiff; there is no ambiguity in the words, but the expressions are positive, clear and unequivocal. He knew that he had undertaken for the performance of the award, if one should be made against his principal; he knew the award was made, and what it was; these he certainly knew when the action on this bond was commenced, which was but a short time after the expiration of one hundred and twenty days from its acceptance in the court of common pleas; it then became his duty to see that it was performed.

Nor was that obligation suspended by the subsequent transactions in endeavoring to obtain a new trial; this court has decided that delaying payment on application for a new trial is at the peril of the party delaying. But in going beyond the penalty of the bond, the court do not go out of the contract; it is no more than the common case of a bond conditioned for the payment of money lying until the sum mentioned in the condition, with the interest of it, exceeds the penalty; in which cases the court will give the excess as damages for the detention of the debt; in no case, however, going so far beyond the penalty as to exceed the legal interest on the penalty. At law the penalty is the debt; and for the detention of the debt, damages, either real or nominal, are always recoverable. The contract at law is to pay the penalty; if the defendants ask equity, they must do equity. Of the real equity of the case I have not a doubt; and that the plaintiff ought to recover the sum awarded, with interest, after one hundred and twenty days from the acceptance of the award in the court of common pleas.

The judgment was accordingly entered up against both the defendants for five thousand dollars debt, and one thousand four hundred and eighty dollars and fifty-five cents damages, for the detention of the debt.

The point determined in this case has since been confirmed in *Brainard v. Jones*, 18 N. Y. 35, where it was held that a recovery against a surety on a bond for the payment of money, is not limited to the penalty, but may exceed it so far as is necessary to include interest from the time of the breach. *State v. Sandusky*, 46 Mo. 377; *Tyson v. Sanderson*, 45 Ala. 364; *Carter v. Thorn*, 18 B. Mon. 613; *Hughes v. Wickliff*, 11 Id. 202, and *Carter v. Carter*, 4 Day, 30. See the note to *Graham v. Bickham*, 1 Am. Dec. 328, where this subject is fully discussed.

EMERSON v. PROPRIETORS.

(1 Mass. 464.)

WHEN ACTION ARISES ON COVENANT OF WARRANTY. — An action on the covenant of warranty in a deed cannot be maintained without showing an eviction by an elder and better title.

ACTION of covenant. The declaration contained two counts. The first stated that the defendant, by a committee of said proprietors duly authorized, did on the tenth February, 1800, for a valuable consideration convey to the plaintiff and his heirs forever, a certain tract of land, and that said committee,

in the name of the defendants, covenanted with the plaintiff to warrant and defend said premises against the lawful claims of any person or persons whatever; that in the year 1799, by a judgment of the supreme court of judicature, now in full force, said premises were decreed to belong to the Pejepscot-proprietors, and that they have a lawful right to hold and enjoy the same; by reason whereof, the covenant of warranty in said deed had been broken. The second count alleged as a breach of the covenant, that at the time of executing the deed the defendants had no lawful right or title to the premises; but that the Pejepscot-proprietors, at that time and long before, were seised in fee thereof.

The defendants pleaded: 1. That they had not broken the covenant as plaintiff had declared, but had kept the same; 2. That prior to executing the said deed to the plaintiff, the commonwealth were seised of said premises and had conveyed the same to the defendants; that they had good right to make the deed to the plaintiffs; and that by the judgment referred to in plaintiff's declaration, the Pejepscot-proprietors acquired no right or title to the premises conveyed by defendants to the plaintiff nor any lawful claim thereto; 3. That the Pejepscot-proprietors were not at the time of executing said deed, or at any time before or since, seised in fee of the premises described in the deed, or any part thereof, nor had any lawful claim or title thereto.

Upon these three pleas issue was joined.

Solicitor-general Davis and Bradbury, for the plaintiff.

Chase and Whitman, for the defendants.

SEWALL, J., was of opinion that in an action upon the covenant in warranty, the only covenant in the deed declared on, an actual eviction must be proved in order to maintain the action. He said: that in England the effect of such a covenant was to enable the grantee, if sued for the land, to vouch the grantor or his heirs to warranty. Here we had gone further, and had considered this as a personal covenant, upon which an action would lie against the warrantor; but still we must resort to the original meaning of the covenant to determine when such action lies. That as the effect there was to enable the grantee to call upon the warrantor to defend the title, so, by a clear analogy, when we here authorize an action to be brought upon this covenant, it must be upon an eviction by elder and better title. He was, therefore, clearly of opinion that the plaintiff had not stated any cause of action.

THACHER, J., said he was clearly of opinion that no action could be maintained on this covenant without showing an eviction.

SEDGWICK, J., said that he concurred without a particle of doubt. This covenant has been for some time considered here as a personal covenant. If it be so, then it is in fact and in essence a covenant for quiet enjoyment, on which no action can be maintained till disturbance in that enjoyment. The plaintiff has shown none, and, therefore, has no cause of action.

The plaintiff had leave to discontinue.

BARTLET v. KNIGHT.

[1 Mass. 401.]

EFFECT OF JUDGMENT OBTAINED IN ANOTHER STATE.—A judgment recovered in one state is not conclusive evidence of a debt in an action brought on such judgment in another state, but in the latter the inquiry may be made whether the court in the former state had properly jurisdiction of the defendant.

CONSTITUTIONAL PROVISION AS TO SUCH JUDGMENTS.—Although the mode of authenticating such judgments has been provided for by the act of congress, pursuant to the constitution, yet the effect of such authentication is not declared by the act.

ACTION of debt upon a judgment recovered in the state of New Hampshire.

The defendant prayed oyer of the record of the judgment mentioned in the declaration, and then pleaded in bar, that at the time of signing the note upon which said judgment was recovered, and at the time of making the promise of payment therein referred to, he was an infant, of the age of fourteen years, and no more. By leave of the court, defendant pleaded a second plea in bar, that at all the times between the making of said note and the recovery of judgment thereon, and ever since, he was, has been, and still is, an inhabitant of and resident in the town of Portland, in the county of Cumberland, in the commonwealth of Massachusetts.

General demurrer to both the pleas, and joinder.

Mellen and Hubbard, for the plaintiff, argued that by the constitution of the United States, and by the law of congress, the judgment was conclusive evidence of a debt, and could not be called in question in the manner attempted by the pleas of the defendant. The constitution, art. 4, sec. 1, declares that

“Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the congress may by general laws prescribe the manner in which such acts, records and proceedings, shall be proved, and the effect thereof.” That the act of congress, 1 cong., 2 sess., chap. 11, having, pursuant to the article in the constitution, prescribed the mode in which the acts, records, etc., in each state shall be authenticated, and having declared the acts, records, etc., so authenticated, “shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from which they are or shall be taken,” has by necessary implication declared the effect of a judgment to be the same in every state that it has in the state where it was rendered. In New Hampshire, nothing which tended to impeach the validity of the recovery of the judgment would there be permitted to be pleaded in bar to an action of debt upon it; and therefore a plea of that sort cannot be allowed here.

Parker, for the defendant, replied that congress had not declared the effect, but had merely prescribed the mode in which records, etc., should be authenticated; that declaring they should have, when so authenticated, such faith and credit given to them as by law or usage they have in the state where rendered, extended no further than to make them incontrovertible evidence of everything that appeared by the record, viz: that the judgment was recovered by and against the parties named, for the sum and for the cause of action expressed, in the manner stated, i. e., whether upon default on trial, etc., that in every other respect they were on the footing of foreign judgments, which were but *prima facie* evidence of a debt; and it was competent for the defendant to show that such judgment was unduly or irregularly obtained.

THACHER, J. In this case, the demurrer confesses the facts stated in the pleas. By the law of this state, applied to these facts, the note mentioned in the judgment declared on would be void. The question then is, whether the judgment rendered as this was, in another state, has precluded the defendant from making, in the present action, the defense which he sets up in his pleas. I think not. And that the article in the constitution of the United States and the act of congress, which have been cited, do not admit of the construction contended for by the counsel for the plaintiff, but that the facts pleaded are by

law pleadable; and as they would have been a legal bar to an action on the note, so they are, of course, to the present action of debt upon a judgment recovered in the state of New Hampshire on the note; and that the defendant is entitled to judgment.

SEWALL, J. By the rules of the common law, the judgment of a court of justice is a ground of action for the party recovering, and the judgment is itself evidence of a debt: 3 Com. Dig. Debt, A; 2 Doug. 1. The circumstances of the present case, however, require us to notice a distinction, which appears to be well established, between domestic judgments and foreign judgments. A domestic judgment, or one that has been rendered in the same court whose aid is required to enforce it, or within the same general jurisdiction, is, while existing unsatisfied, considered and observed as an incontrovertible proof of the debt, liable to no exception or inquiry. But a foreign judgment, though it may be declared on as a consideration from which a promise or debt of the party charged by it is implied or enforced, and though proof of the judgment alleged must be admitted as sufficient evidence, *prima facie*, of the debt, yet it is not an incontrovertible proof: Doug. 6. This distinction, established by the decisions and practice of the superior courts of justice in England, has been adopted with us, and is warranted by sound reason, and the general principles of the common law. The extent of its application here, rather than the distinction itself, whether it extends to a judgment recovered in a court of any other state of the United States, when demanded as a debt within this state, has been the principal question contested in the case before us. The constitution of the United States has provided that full faith and credit shall be given, in each state, to the public acts, records, and judicial proceedings of every other state; and that congress may, by general laws, prescribe the manner in which such acts, records and proceedings shall be proved, and the effect thereof. By a law of the United States, pursuant to this article of their constitution, the forms to be observed for the authentication of the records and judgments of the courts of justice within the several states have been directed; and it is thereby provided, that such records and judicial proceedings, so authenticated, shall have the same credit in every court in the United States as they have by law or usage in the courts of the state from whence such records shall be taken. And an act of the legislature of this state recognizes an action of debt as a process which may be brought

within this state upon a judgment rendered by a court of record in any other of the United States. Have these constitutional and legislative provisions placed judgments recovered in any court of record within every other state of the United States, upon the same ground, in all respects, with judgments rendered by a court of record within this state?

My opinion is, that the effect of a judgment, that is, the rights of the party claiming under it, and the liability of the party charged by it, are not enlarged or affected by the constitution or law of the United States, or by the statute of this state. The article cited from the constitution of the United States, and the act of congress pursuant to it, appear to me to be confined to the sole purpose of directing the modes of proof and the effect thereof, to be employed in authenticating records when certified from one state to another within the United States. And the statute of this state, in recognizing an action of debt as a proper process upon all judgments, whether recovered within this state or any other of the United States, has not intended an alteration of the common law, or to give the same authority and effect to foreign judgments, which all judgments are allowed to have within the jurisdiction which renders them, or suffers them to remain in force. I conclude, therefore, upon the whole, that a judgment certified from a court of record in any other state, when demanded as a debt within this state, is not an incontrovertible proof of such debt; and that the grounds of such judgment, when impeached by the defendant, may be on that occasion examined.

In the case before us, the demand of the plaintiff is for the amount of a judgment rendered by a court of record in the state of New Hampshire; and it is averred that the defendant, the person nominally charged by the judgment, became accordingly indebted to the plaintiff. This demand is answered by a plea which, if seasonably exhibited and confessed, as it now is, by the plaintiff's demurrer, would be sufficient with us to prevent such a judgment upon the original demand of the plaintiff against the defendant as we now are requested to enforce. Secondly, the defendant alleges circumstances, likewise confessed by the plaintiff's demurrer, from which a want of notice in the original suit, and a want of capacity to defend against it, are necessarily inferred. The process certified to us and having, as evidence of a public record, the same faith and credit with us as it would have in New Hampshire, shows that the judgment, of which the effect of a debt is demanded in this

action, was rendered without actual notice to the defendant, or any appearance by him, or any guardian for him; he being at the time confessedly an infant under the age of twenty-one years. Upon the principles as well of natural justice as of the common law, a judgment liable to these objections must be determined to be no just or legal consideration, from which a promise or debt of the party, nominally charged by it, ought to be implied or inferred. This jurisdiction, therefore, will not enforce, as a debt, the judgment certified in this case, against the pleas of the defendant, which, to the purpose of showing there is no debt, are a sufficient answer to the plaintiff's declaration.

SIDEWICK, J. This is an action of debt brought on a judgment recovered by the plaintiff against the defendant, in the state of New Hampshire, and the original action was brought on a promissory note. By the pleadings it appears that the defendant, when the note was given, and until and at the judgment, was an infant; and that he was during all that time an inhabitant of this commonwealth. The judgment was rendered on default, and it does not appear that the defendant had personal notice of the suit; and we know it is not in New Hampshire, as it is in England, a prerequisite to the judgment.

The facts on which the defendant relies are disclosed by the pleadings, and the question is, whether such a judgment, so obtained, is conclusive evidence of a debt. If the judgment partakes of all the properties of a domestic judgment, it is so, otherwise we can extend relief to the defendant, according to the justice of the case. This depends on the construction which shall be given to the first section of the fourth article of the constitution of the United States, and the act of congress made in pursuance thereof. The act of congress, after prescribing the mode in which "the public acts, records, and judicial proceedings in each state shall be authenticated," goes on to declare, "that the said records, etc., authenticated as aforesaid, shall have such faith and credit given to them in every court within the United States as they have by law or usage in the courts of the state from whence the said records are or shall be taken." It will appear that as well the effect of records, etc., as their mode of authentication is, by the constitution, within the authority of congress. What the effect shall be is not declared by the statute. It is indeed provided, that, being authenticated, they shall in all events have such faith and credit given to them as they are entitled to in the state from

which they are taken. The meaning I take to be this, and no more: that they shall be incontrovertible and conclusive evidence of their own existence, and of all the facts expressed in them. The act, however, stops short of declaring what shall be their effect; and congress have wisely left this to the judicial department.

As by our union a greater degree of comity is due to the proceedings of our sister states, than to those of states which are in every respect foreign, the section of the article of the constitution already mentioned declares that "full faith and credit shall be given in each state to the public acts, records and judicial proceedings of every other state." The precise extent of this "faith and credit" it is not necessary to define in order to decide the present case; thus much, however, it seems to me is necessarily implied, that the courts of the other states shall never be charged with collusion, corruption or a mere error of judgment. If it be true, in fact, that the judgments of the other states, are to be considered, to all intents and purposes, as the judgments of courts in states which are merely foreign, then it will follow irresistibly, that this provision of the constitution is altogether idle and insignificant, a conclusion which I should with reluctance draw as to any part of the constitution. If my construction be right, then it will result that wherever there has been a trial in another state, the judgment will be conclusive; and, perhaps, it may not be going too far to say, that if there be personal notice to the defendant, and on his part no disability, that the judgment shall be binding on him; and it will, in all cases, on this construction, conclude the plaintiff. But I am decidedly of opinion that it would be going too far to say that a judgment of one of the other states should in all cases have the same effect as a domestic judgment; and the present case is, in my opinion, a strong instance to show that it should not. This is a judgment against a citizen of another state, without trial, without notice; and who, as well at the time of the judgment as at the time of the contract alleged, was an infant. To this judgment I give "full faith and credit;" but although I do this, I cannot say that I think it binding on the defendant; and the mischiefs of such a determination would be incalculable. It is well known that many of the states, of which this is one, proceed to final judgment without requiring the appearance of the defendant, or even personal notice to him. The return of an officer of a summons left with the defendant's agent or attorney, or at the last and usual place

of the defendant's abode, is sufficient authority to the court to proceed to a judgment. An officer may be mistaken; he may act by collusion; or, if neither, notice may never reach the defendant; that defendant may be an inhabitant of the most distant state. Shall he be bound by the judgment conclusively? It would be monstrous. I am, therefore, clearly of opinion that the pleas in bar here are sufficient, and that there must be judgment for the defendant.

EFFECT OF JUDGMENTS OF OTHER STATES.—The signification of the constitutional provision that "full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state," has been much discussed; and the decisions have been in much confusion on the subject. Two extreme views were adopted; on the one hand, a series of decisions hold that a judgment obtained in another state is, in every other state where any right is claimed under it, entitled to the same credence, and is as conclusive in the latter as in the state where the judgment was obtained; while another class deny that a judgment of this kind is entitled to any more faith, except as to the character of the record as evidence than a foreign judgment. The latter hold that the constitutional provision did no more than declare the mode of authenticating the record, and the faith given to such record of a judgment of another state, without declaring the effect of the judgment in the state where it is brought under consideration. This is the language of Clifford, J., in *Christmas v. Russell*, 5 Wall. 305: "Cases may be found in which it is held that the judgment of a state court, when introduced as evidence in the tribunals of another state, are to be regarded in all respects as domestic judgments. On the other hand, another class of cases might be cited in which it is held that such judgments in the courts of another state are foreign judgments, and that as such the judgment is open to every inquiry to which other foreign judgments may be subjected under the rules of the common law. Neither class of these decisions is quite correct. They certainly are not foreign judgments under the constitution and laws of congress in any proper sense, because they 'shall have such faith and credit given to them in every other court within the United States as they have by law and usage in the courts of the state from whence' they were taken; nor are they domestic judgments in every sense, because they are not the proper foundation of final process, except in the state where they were rendered. Besides, they are open to inquiry as to the jurisdiction of the court and notice to the defendant; but in all other respects they have the same faith and credit as domestic judgments."

It would serve no practical use, at the present time, to review the decisions generally on this subject; because however conflicting may have been the views formerly entertained by the courts, there is now a more settled uniform state of the law on this matter. We will, therefore, merely advert to the leading cases, which have given an authoritative exposition of the law, and laid down principles now generally accepted and recognized. The first authoritative exposition of the law was given in *Mills v. Duryee*, 7 Cranch, 481, decided in 1813, where it was held that *nil debet* was not a good plea to an action founded on the judgment of another state. The action was founded on a judgment obtained in the state of New York, in

which the defendant had full notice of the suit, having been arrested and given bail. The opinion of the court was given by Story, J., who thus remarks: "But it is said that admitting that the judgment is conclusive, still *nil debet* was a good plea; and *nul tiel record* could not be pleaded, because the record was of another state, and could not be inspected by *certiorari*. Whatever may be the plea of *nil debet* after verdict, it cannot be sustained in this case. The pleadings in an action are governed by the dignity of an instrument on which it is founded. If it be a record conclusive between the parties, it cannot be denied but by the plea *nul tiel record*; and when congress gave the effect of a record to the judgment, it gave all the collateral consequences. There is no difficulty in the proof. It may be proved in the manner prescribed in the act, and such proof is of as high a nature as an inspection by the court of its own record, or as an exemplification would be in any other court of the same state. Had this judgment been sued in any other court of New York, there is no doubt that *nil debet* would have been an inadmissible plea. Yet the same objection might be urged that the record could not be inspected. The law is, however, undoubted that an exemplification would in such case be decisive. The original need not be produced." This case became a leading case on the subject; but it was variously construed, and the consequence was the decisions still fluctuated, many misapprehending the precise scope and purport of the decision of the supreme court. Did the case decide that such a judgment was conclusive, if the record was complete, so as to shut out every defense to an action on such judgment in another state? So it was conceived. But in Massachusetts, in a few well considered cases, the true signification of the constitutional provision, as expounded in *Mills v. Duryee*, was given, and principles laid down that have since been adopted not only in other states, but in a late decision of the supreme court, which may now be considered as having settled the law on this subject.

The first of these cases was *Bissell v. Briggs*, 9 Mass. 462, where it was held that a court of another state must have had jurisdiction of the parties, as well as of the cause, for its judgment to be entitled to the full faith and credit mentioned in the federal constitution. The question was again more fully examined in *Hall v. Williams*, 6 Pick. 232, and an able opinion given by Parker, C. J. He held that in every instance the inquiry could be made, in suits on such judgments, whether the court had properly jurisdiction of the person or subject-matter when it gave judgment. As to *Mills v. Duryee*, he remarks: "The case of *Mills v. Duryee* has, as its importance merited, undergone a revision in almost every state court in the Union, of whose decisions we have any printed account; and the opinion has been unanimous, without the dissenting voice, as far as we can learn, of a single judge, that that case, however unqualified it may appear in the report, does not warrant the conclusion that judgments of state courts are in all respects the same when carried into another state to be enforced as they are in the state wherein they are rendered, but that in all instances the jurisdiction of the court may be inquired into."

A series of cases in Massachusetts affirms the principles here laid down, that the inquiry may be made as to the jurisdiction of the court; and even if the record explicitly states the jurisdiction to have been acquired, it may be contradicted. This was so held in *Carleton v. Bickford*, 13 Gray, 591, which was approved in the case of *McDermott v. Clary*, 107 Mass. 501, where a similar point was decided. See further *Gleason v. Dodd*, 5 Met. 333; *Bissell v. Wheelock*, 11 Cush. 277; *Bodurtha v. Goodrich*, 3 Gray, 508. The New York decisions, before 1813, when the case of *Mills v. Duryee*

was decided, are of little consequence, because, since that time, the cases in that state conformed to the decision of the supreme court: *Kinnier v. Kinnier*, 45 N. Y. 541. The leading cases are: *Starbuck v. Murray*, 5 Wend. 148; *Shumway v. Stillman*, 6 Id. 447; *Borden v. Fitch*, 15 Johns. 121; *Dobson v. Pearce*, 12 N. Y. 146; *Kerr v. Kerr*, 41 Id. 272; *Kinnier v. Kinnier*, 45 Id. 535; *Hoffman v. Hoffman*, 46 Id. 30. In *Shumway v. Stillman*, Savage, J., says: "An examination of the cases results in the establishment of the following proposition: That the judgment of a court of general jurisdiction in any state of the Union, is equally conclusive upon the parties in all the other states as in the state in which it was rendered. This, however, is subject to two qualifications: 1. If it appear by the record that the defendant was not served with process, and did not appear in person or by attorney, such judgment is void; and 2. If it appear by the record that the defendant appeared by attorney, the defendant may disprove the authority of such attorney to appear for him." Here, it will be observed, that the court does not go quite so far as to admit that the record may be contradicted when it recites a personal appearance by the defendant. The court, however, in *Kerr v. Kerr*, went so far as to permit the recital of the record of a judgment of divorce in Indiana, to be contradicted by evidence showing that the residence which was recited therein to give the court jurisdiction, was never in fact acquired, and that therefore the court had no jurisdiction to pronounce the decree. The latest decision we are able to find in New York is *Hoffman v. Hoffman*, 46 N. Y. 30, where it is held that the record of a decree of divorce is not conclusive as to jurisdiction, but the facts therein stated giving the court jurisdiction may be disputed. The same point is decided in a well considered case in Missouri, *Mars v. Fore*, 51 Mo. 69; S. C. 11 Am. Rep. 432. See further, affirming the doctrine: *Denison v. Hyde*, 6 Conn. 508; *Coit v. Haven*, 30 Id. 190; *Wescott v. Brown*, 13 Ind. 83; *Harshey v. Blackmar*, 20 Iowa, 161; *People v. Dawell*, 25 Mich. 247; *Frothingham v. Barnes*, 9 R. I. 474. The Pennsylvania courts do not admit that the record can be disputed to this extent; for in *Wetherill v. Stillman*, 65 Pa. St. 105, it is held that no averment can be made against the conclusiveness of the record, unless it be shown that the court was of special or limited jurisdiction. However, from this decision a very able judge, Sharswood, J., dissented.

But much of the uncertainty on this question must now be removed by the late decisions of the United States supreme court, in *Thompson v. Whitman*, 18 Wall. 457, and *Knowles v. Logansport Gas Co.*, 19 Id. 58.

In *Thompson v. Whitman*, the question was fully and ably discussed by Bradley, J., who reviewed the adjudications of that court, and examined many of the decisions of the state courts bearing on the question. The question was then fairly presented to the court for decision as to whether the record was conclusive when it recited facts showing the jurisdiction of the court over the person or subject-matter. The court gave a construction to *Mills v. Duryee*, conformably to that held in the Massachusetts cases. Speaking of the act of Congress made in pursuance of the constitutional provision, he says: "It has been supposed that this act, in connection with the constitutional provision which it was intended to carry out, had the effect of rendering the judgments of each state equivalent to domestic judgments in every other state, or at least of giving to them in every other state the same effect in all respects, which they have in the state where they are rendered. And the language of this court, in *Mills v. Duryee*, 7 Cranch, 484, seemed to give countenance to this idea. The court in that case held that the act gave to the judgments of each state the same

conclusive effect, as records, in all the states, as they had at home; and that *nil debet* could not be pleaded to an action brought thereon in another state. This decision has never been departed from in relation to the general effect of such judgments when the questions raised were not questions of jurisdiction. But where the jurisdiction of the court which rendered the judgment has been assailed, quite a different view has prevailed."

Referring to the question before the court, he says: "But it must be admitted that no decision has ever been made on the precise point involved in the case before us, in which evidence was admitted to contradict the record as to jurisdictional facts asserted therein, and especially as to the facts stated to have been passed upon by the court." And passing on this question the conclusion of the court is: "On the whole we think it clear that the jurisdiction of the court by which a judgment is rendered in any state may be questioned in a collateral proceeding in another state, notwithstanding the provision of the fourth article of the constitution, and the law of 1790, and notwithstanding the averments contained in the record of the judgment itself." This decision will now be accepted as settling points that have hitherto been a subject of much discussion in our state courts.

JURISDICTION, HOW ACQUIRED.—To give the court jurisdiction of the parties, or the subject matter, it is necessary that the former must either by residence or citizenship come under its jurisdiction, and that in the latter case the *situs* of the property should be within the territory over which the court exercises jurisdiction. To hold otherwise would permit the laws of a state to have an extra-territorial force, which can never be assented to. This was distinctly laid down in *D'Arcy v. Ketchum*, 11 How. 165, which was an action in the circuit court of the United States for Louisiana, brought on a judgment rendered in New York under a local statute, against two defendants, one of whom only was served with process, the other being a resident of Louisiana. It was held that the judgment was void as to the defendant not served, and that the law of New York could not make it valid outside of that state. The same principle was ably asserted by Beasley, C. J., in *Mackay v. Gordon*, 34 N. J. L. 206, which was a similar case to *D'Arcy v. Ketchum*. "Every independent government," says the chief justice, "is at liberty to prescribe its own method of judicial process, and to declare by what forms parties shall be brought before its tribunals. But in the exercise of this power, no government, if it desires extra-territorial recognition of its acts, can violate those rights which are universally esteemed fundamental and essential to society. Thus a judgment by the court of a state against a citizen of such state in his absence, and without any notice, express or implied, would, it is presumed, be regarded in every external jurisdiction as absolutely void and unenforceable. Such would certainly be the case if such judgment was so rendered against the citizen of a foreign state." This point was actually determined in *Kane v. Cook*, 8 Cal. 449. An action was begun in New York by publication of the summons, against a citizen of California, who was never within the jurisdiction of that state, and a judgment obtained. In a suit on such judgment in California it was held in an able opinion by Field, J., that no jurisdiction in the original action was ever acquired over the defendant, and that therefore the judgment was not entitled to the faith required by the constitution. This decision is cited and its doctrine affirmed in *Melhop v. Doane*, 31 Iowa, 403, and *Green v. Van Buskirk*, 7 Wall. 149. In *Prosser v. Warner*, 47 Vt. 667, the same principle was held in

regard to a judgment for alimony obtained by a wife in New York, whose husband was a resident of Vermont, and was not personally served.

FRAUD AS A PLEA.—When it appears that the court rendering the judgment had properly acquired jurisdiction, it is difficult to see how the plea of fraud can be admitted in an action elsewhere on the judgment; for it is a guiding principle that courts, as well in the jurisdiction as beyond it, will not examine matters that have been or might have been litigated in a former action. Therefore, on this principle, when the jurisdiction is established, it may well be replied, when such a plea is advanced in an action on the judgment, that it was the duty of the party when an opportunity was given him to tender that plea in the former action, and that he must now be precluded from availing himself of it; and this is established by the better class of cases. It was so determined in *Christmas v. Russell*, 5 Wall. 290, after a review of many cases by Clifford, J.; and the same point has been determined in a late decision of the supreme court, *Maxwell v. Stewart*, 22 Wall. 77, where the doctrine of *Christmas v. Russell* is approved, regarding fraud as a defense to an action on a judgment of another state. To the same point are *Benton v. Burgett*, 10 S. & R. 240; *Granger v. Clark*, 22 Me. 128; *Anderson v. Anderson*, 8 Ohio, 108; *Sandford v. Sandford*, 28 Conn. 628. The limit to which courts will go in this respect is well laid down in *Davis v. Headley*, 22 N. J. Eq. 115, where it is held that the court will not enforce a judgment of the courts of another state obtained by fraud. And in a court of equity it can make no difference whether the fraud is set up as a defense or in support of a suit to restrain further proceedings on the judgment; but when the case shown by the record is such that no court could, upon any principles of law, have given the judgment unless imposed upon, this will be regarded and taken as proof that the judgment was obtained by fraud on the court.

APPEAL AS A DEFENSE.—Whether the fact that an appeal from the judgment in the state where it was given is a good plea against such judgment in another state was considered in *Taylor v. Shaw*, 39 Cal. 536, and it was there decided that an action on a judgment of a court of competent jurisdiction in the state of New York may be maintained, notwithstanding an appeal from such judgment has been taken and is still pending in the court of appeals in New York; and to constitute a valid defense to such an action, it must be shown that the appeal had the effect to suspend the judgment appealed from, or of staying the execution thereof. A similar decision has been lately made by the supreme court of Rhode Island in *Paine v. Schenectady* (10 Chicago L. N. 93). This was an action of assumpsit, in which the defendant pleaded in bar a former judgment recovered in the supreme court of New York. The plaintiff replied that the judgment had been appealed by him, and the suit was still pending in the court. The defendant demurred to the replication, contending that by the law of New York, an appeal does not vacate the judgment appealed from, but leaves it, until annulled or reversed, conclusive upon the parties. Durfee, C. J., decided to sustain the demurrer to the replication, holding that as it was conclusive in New York, the judgment should be so considered in that court until set aside there. He says: "The case of *Bank of North America v. Wheeler*, 28 Conn. 433, is a case exactly in point. After the commencement of that case in Connecticut, a judgment was recovered for the same cause of action in New York, and it was held that the judgment, notwithstanding it had been appealed from, was a good bar to the suit in Connecticut, it being found that by the law of New York, the appeal operated only

as a proceeding in error, and did not vacate the judgment. We think, therefore, that the demurrer to the first replication must be sustained. We will add, however, as a matter of practice, that we think the pendency of the appeal in New York may be a good ground for delaying judgment here, until the appeal is disposed of; for otherwise we may give the judgment here a permanently conclusive character, whereas in New York, if the appeal is successful, it will be conclusive only for a short time."

2

CASES
IN THE
SUPREME COURT OF ERRORS*
OF
CONNECTICUT.

NORTHROP v. SPEARY.

[1 DAY, 23.]

REAL ESTATE—PAROL AGREEMENT RELATIVE TO SALE OF.— An agreement made at the time of a sale and conveyance of land, the seller taking the purchaser's note for the consideration, that, if on measurement, the land should exceed a certain stated quantity, the purchaser should pay the seller an additional sum therefor, cannot be proved by parol evidence.

ACTION OF ASSUMPSIT. The declaration stated that on the nineteenth day of June, 1799, plaintiff, Speary, conveyed to defendant a certain tract of land, supposed to contain forty-two acres two quarters and twenty-one rods; that such being the quantity of land, it was agreed that defendant should pay a certain price, which, upon the execution of the deed, he accordingly paid, giving his note therefor; that it was at the same time further agreed, that if said land, on admeasurement, contained more than the same quantity, the defendant should pay to the plaintiff for such excess a sum in the same proportion to the purchase money, as the excess to the estimated quantity;

*The act organizing the supreme court of errors thus provided: "That the governor, lieutenant-governor, and council for the time being, any eight of whom shall constitute a quorum, shall be the supreme court of errors in this state, and shall be the dernier resort of all matters brought by way of error or complaint from the judgment or decree of the superior court, in matters of law or equity, wherein the rules of law or the principles of equity appear from the files, records, and exhibits of said court to have been erroneously or mistakenly adjudged." Acts and Laws of Connecticut. Compilation of 1805, page 127.

The council here referred to was an elective body consisting of twelve persons, chosen annually, who were designated assistants of the state for the year then ensuing. The court of errors generally gave its opinion at length only in a case of reversal; nothing being said as to the reasons of the court when the judgment was affirmed.

and that if it contained less than such quantity, the plaintiff should refund to the defendant a like proportional sum for such deficiency; that said tract of land was afterward found to contain six acres two quarters and nineteen rods more than was contemplated; that the value of such excess was one hundred and seventy dollars.

At the trial, the plaintiff offered to prove the agreement stated by parol testimony. This was objected to, but the objection was overruled, and an exception taken. The jury found for the plaintiff and assessed the damages. On the bill of exceptions, the case came before this court.

Smith and Ruggles, for the plaintiff in error, urged: 1. That the promise was within the statutes of frauds and perjuries, *Haynes v. Hare*, 1 H. Bl. 659; *Preston v. Merceau*, 2 W. Bl. 1249; *Bradley v. Blodget*, Kirby, 22 (1 Am. Dec. 11); 2. The acknowledgment in the deed by the grantor that he had received payment in full, precluded him from making this demand; 3. The contract set up in the declaration is merged in the deed and note. And if the plaintiff could recover on the ground of excess, the defendant could, on the same principle, have recovered for a deficiency, and that recovery would have operated to destroy the note, or make a reduction from it, which cannot be done by parol agreement made at its execution.

Allen, for the defendant in error, replied: 1. That the statute of frauds and perjuries did not touch this case, it not being a contract for the sale of lands, or any interest in them; 2. That the acknowledgment in the deed was not conclusive, and, at most, only evidence that the plaintiff had received a valuable consideration, so as to prevent its being considered a resulting trust; 3. That the deed and note were not evidence of this contract, it was independent of these instruments, and might be carried into effect without violating any principle of law. *Mott v. Hurd*, 1 Root, 73, and the cases there cited.

By COURT. The contract, stated in the declaration, was but one entire contract, made at the time of the sale and conveyance of the land, the whole of which is to be considered as included in the deed and note. If parol testimony be admissible to establish the claim of the plaintiff below, on account of an excess of land, on the same principle it must have been admitted had the land fallen short of the estimate made at the time of the sale and conveyance, on a claim of reduction from

the sum secured by the note. The effect of such construction and practice, would be the destruction of all written contracts. Judgment reversed.

TREADWELL, Lt. Gov., WILLIAMS and NEWBERRY, Asts., dissenting.

See *Bradley v. Blodget*, 1 Am. Dec. 11, and the note thereto, for a decision on a similar point.

CORNWELL v. ISHAM.

[1 DAY, 33.]

COMPETENCY OF WITNESSES TO A WILL. — The inhabitants of an incorporated society, to whom property is devised for the support of a school, are competent witnesses to attest the will.

APPEAL from a decree of the probate court establishing the last will and testament of Pierpont Bacon.

The reasons stated by the appellants in support of their appeal were, that they were next of kin to the testator; that by said will he gave thirty thousand dollars to the inhabitants of the First Society in Colchester, for the purpose of supporting a school in said society, at such place, near the meeting-house, as such inhabitants should agree upon, for the instruction of youth in certain branches of learning; that after providing for the management of the property thus given, he directed the interest and rents should be received for the support of said school; and that the person by whom the will was drawn, and the witnesses thereto, were inhabitants of said society, residing near the meeting-house, possessed of large estates, and having minor children to educate at school.

The executor, Isham, replied that the society was large and wealthy, and had sufficient funds for the education of all their youth in the ordinary branches of science already provided for.

To this replication there was a demurrer. The superior court adjudged the replication sufficient, and affirmed the decree of probate.

Error was assigned generally.

Ingersoll and Hosmer, were counsel for the plaintiffs in error. The general exception taken to the decree of probate was, that the witnesses to the will having an interest under it, were incompetent. In support of this general exception, the following propositions were laid down:

1. Interest disqualifies, notwithstanding the public as well as

private object of the bequest. The statute makes no exception; the reason of the case makes none. The object is of benefit to the public, but it is a corporation interest. The idea that a bequest to a corporation for schools, etc., may be proved by a corporator is suggested in 1 Gilb. 242, where *Townsend's case*, 2 Sid. 109, is cited; but the citation does not support the principle laid down in Gilbert; and moreover the reason assigned in Gilbert, "because no man gets or loses by the event of the trial," shows that that case is inapplicable here, for a devise to support schools relieves from taxation.

2. The inhabitants of the first society of Colchester, particularly the witnesses to the will, had an interest in the devise, a pecuniary interest, which is not overcome by the fact that the society was wealthy.

3. The interest was not trifling, remote, or contingent. Even if it were trifling, it would make no difference: 3 Wooddeson, 290. Where the inhabitants of counties and parishes, in actions for penalties under certain statutes were allowed to testify, it was only by virtue of a legislative enactment. The cases in Espinasse's Digest, p. 715, are all of that class where there was no interest at all, except in the one of the steward, who was admitted as a witness from necessity. As to the remoteness and contingency of the interest, the witnesses were not mere trustees; they were *cestui que trust*; they were in fact devisees. It is not contingent, when the testator died it became vested; the fee is in the corporation, and the witnesses had a portion of the fee in them as members of the corporation. Possibilities of a certain class, much more contingent than this interest, can be devised or granted, or may descend: *Selwin v. Selwin*, W. Bl. 222; *Gurnel v. Wood*, Id. 225; *Marks v. Marks*, 1 Str. 129; *Goodright v. Searl*, 2 Wils. 29; *Pinbury v. Elkin*, 1 P. Wms. 564.

4. There has been no settled practice admitting the inhabitants of a society to testify in cases in which the property of the corporation is concerned, or to which the corporation is a party. *Townsend's case* does not deserve the force of authority, because there the interest was very small. The next case worthy of attention is the *Water-bailage case*, in the year 1682, in which the question was, whether the city of London had a right to a certain duty for goods imported, and freemen of the city were offered as witnesses. The reporters differ as to the decision of this case in the King's Bench. In 1 Vent. 351, it is said that the witnesses were admitted, a bill of exceptions was filed, and

afterward their testimony was waived. In 2 Show. 148, it is reported that the witnesses were not admitted, and that a bill of exceptions was filed, and this view was adopted in *Colfield v. Wilson*, 1 Vern. 254. In *Dotswell v. Nott*, 2 Vern. 317, Lord Somers decided that when the dispute was touching the loss of money given to the petitioners, no inhabitant of the parish should be admitted as witness. In *Brown v. Corporation of London*, 11 Mod. 225, on a question respecting prescription for a toll, Holt, C. J., would not permit a corporator to be a witness. In *Attorney-general v. Wyburgh*, 1 P. Wms. 599, Lord Parker decided that parishioners were not good witnesses to prove a charity given to the parish; and a similar point was decided in *Burton v. Hinde*, 5 T. R. 174. In this state, corporators have been admitted as witnesses only in cases of necessity: *Smith v. Barber*, 1 Root, 207. In *Newell's case*, which related to certain transactions in which the first society in Torrington was interested, the members of that corporation were rejected, because it appeared that other witnesses could be had. The necessity is always a question of fact, or an inference from facts.

Edwards and Daggett, for the defendant in error, contended that even in the courts of Westminster, the will would be adjudged properly witnessed. All the cases cited, in which the witnesses were deemed incompetent, are, where they received property, or were discharged from the payment of rates or taxes, or relieved from other burdens. Here the society was merely a trustee. No fee-simple was conveyed to the individuals. They received nothing by the will which they could sell or devise, or which could be descendible to their heirs. No part of the property could be taken for any other purpose; nor did it appear that the corporators were permitted to educate their children at this school, free of expense; or that it was not open to everybody as well as to the inhabitants of that society. The witnesses might indeed be biased in favor of the will; but they were only remotely or contingently interested: *Townsend v. Row*, 2 Sid. 109; *Wyndham v. Chetwynd*, 1 Burr, 421; *The King v. Prosser*, 4 T. R. 17. They urged further that in this state, in all cases, the inhabitants of corporations have been admitted as good witnesses, and cited *Sandford's case*, decided in 1779, where parishioners were admitted to prove the sanity of the testator, and that he was not under any undue influence, though the will contained a devise to the parish.

By Court. The judgment affirmed.

PUNDERSON v. BROWN.

[1 DAY, 93.]

EQUITY OF REDEMPTION LIABLE TO EXECUTION.—An execution may be levied upon an equity of redemption as real estate, and the creditor, after having the same appraised and set off to him according to the statute, acquires all the right of the mortgagor in the premises.

MORTGAGOR CANNOT REDEEM.—Where the equity of redemption is sold under a levy of execution, the mortgagor's right to redeem is thereby lost.

PETITION in chancery, praying liberty to redeem certain lands. The facts appeared as follows: That on the first of October, 1785, the petitioner mortgaged the lands in question to Halsey and Bellows, to secure the payment of ninety-two pounds two shillings and ninepence by the first of April next; that on the fifth of January, 1786, E. Punderson, Sen., levied an execution in his favor, against the petitioner, on the mortgaged premises, and procured the equity of redemption to be set off to him, at the appraised value of forty-two pounds ten shillings in part satisfaction of the execution; that nine acres, part of the premises, had been, before this time, sold for taxes; that in July, 1786, said E. Punderson redeemed said nine acres, receiving a deed of release from the purchaser, and on the sixth of February, 1787, conveyed the same to his son, who having paid to Halsey and Bellows the whole of the mortgage money on the twelfth March, 1787, took an assignment from them of all their right, title and interest in the mortgaged premises; that the son, on the first of April, 1787, entered upon the premises, and received the rents and profits thereof until the sixth of March, 1796, when he conveyed the same to James Allyn, who remained in possession thereof from that time to the date of the petition.

The superior court having ascertained, by a committee, the amount due from the petitioner, decreed a redemption of the premises in favor of the petitioner, upon the payment of that sum within a given time.

The only question before this court was, whether this estate be a redeemable estate?

Halsey, for the plaintiffs in error, contended that the law of Connecticut authorizes the levy of an execution upon the equity of redemption, it being property of value; that being real property it must be appraised, and, that when appraised and set off, the fee simple passes to the creditor, as in other cases of levy on real estate, and from that time is not redeemable.

Spalding and Goddard, for the defendant in error, contended that a levy of an execution on mortgaged premises, creates only a lien, and the creditor is considered only a second mortgagee, liable to have the estate redeemed.

By COURT. The facts respecting the taxes and the nine acres incumbered thereby, may be laid out of the case, because: 1. It does not appear by the decree that the appraisers knew of his incumbrance, and if they did not the petitioner has sustained no injury; but, 2. If this incumbrance was considered, still it cannot affect the case, for the nine acres had become irredeemable, the purchase-money not having been paid by the petitioner within the time limited by law. The only question then is, whether, under the circumstances of this case, there was any right in the petitioner to redeem, the equity of redemption having been taken by Punderson's execution, and transferred to him.

It was argued by the counsel for the defendant in error that an equity of redemption cannot be taken on an execution, for that the statute authorizes a levy on "all lands and tenements, belonging to any person in his own proper right in fee," etc. To this it may be answered that the policy of our law is that every species of property should be responsible for the payment of debts; and that, if the construction contended for should prevail, no estate for life, or years, could be subjected; yet the practice is otherwise. But the estate which the mortgagor has in the mortgaged premises is real estate, and often of great value. It descends to heirs, is regulated by the statutes of distribution, and does not go to executors; it passes by words in a devise, which pass real estate; and it is ever considered as such in substance, though technically speaking, the legal right is in the mortgagee. It may be added that it would operate great injustice to give this statute a construction by which equities of redemption should be exempt from liability to the payment of debts; nor have the superior courts, it is believed, ever admitted such a construction.

The principle, therefore, adopted by the superior court, in passing this decree, must have been that the levy of an execution upon an equity of redemption in every case operates like a second mortgage; and, of course, that property thus taken is redeemable from the execution creditor. This is a legal principle. In examining this principle the statute must govern, since the right to take lands by execution is given by the statute. After describing the proceedings to be had under an exe-

cution levied on the land, the legislature declare, "and all executions levied upon such houses and lands being, with the return of the officer thereon, recorded in the records of land in the town wherein such houses or land are situate, and also returning into the clerk's office of the court, out of which the same issued, and there recorded, shall make a good title to the party, for whom they shall be taken, his heirs and assigns forever." It is undoubtedly a fair construction of this act, that whatever interest the debtor had should, by the levy, become vested in the creditor. But the principle adopted by the court in this case transfers to Punderson a mere redeemable interest, or a mortgage which is personal estate. The equity of redemption, however, in Brown, the petitioner, was a thing totally different, to wit, real estate. Their principle leaves Punderson still a creditor, and Brown a debtor, to the amount of forty-two pounds and ten shillings, and the execution entirely unsatisfied. Indeed, the creditor has obtained only a lien on the property which may be removed by the payment of the debt. The appraisal is, therefore, idle. But such ideas are not suggested by the statute, and therefore cannot be supported. To the argument of the counsel for the defendant in error, that if the levy of an execution be not treated merely as a second mortgage, it will follow that the appraisers may be obliged to decide many very important questions, it may be replied: First. That appraisers of land upon executions, according to the universally acknowledged construction of the statute, may be obliged to decide very nice and interesting questions; as where the fee is levied upon, and it is incumbered by a tenancy by the curtesy, or dower, or other life estate, or by a tenancy for years. Questions may here arise as to the value of those incumbrances, or whether the instruments by which they were created, are usurious, fraudulent or forged, or as to the legal effect of those instruments. So, in case the estate of the mortgagee should be levied upon, the appraisers may be obliged to decide also as to the validity of the deed, and the amount due, rents and profits, betterments, etc., as circumstances may require. But it will be difficult to see how such a levy should operate as a second mortgage. It is not here asserted that the interference of a court of chancery may not be proper in a case which may be imagined. An appraisal may be made under a misapprehension respecting the amount of the debt, the quantity, quality or title to the property, and in many other ways, when the aid of chancery may be necessary to the attaining of justice. But

none of those embarrassments occur in the case before us; for, secondly, the petition and the decree show that no difficulty here existed; the appraisers had no question but the most simple to settle; the amount of the incumbrance was the debt due to Halsey and Bellows; there were no rents and profits, or betterments, to be adjudged, for the mortgagor had remained in possession. When the value of the land was ascertained, and the principal and interest of the debt due to Halsey and Bellows deducted, the residue was the value of Brown's equity of redemption. This paid only a part of Punderson's execution. Why, then, did not this levy take the whole interest of Brown, and consequently his right to redeem? The legal estate is vested in Punderson by contract; the equity of redemption, by operation of law, is transferred to him; and the legal and equitable interest being gone, what has Brown left? Had Brown released his equity to Punderson, surely the whole interest would have been vested in Punderson. It is as effectually done by the levy in pursuance of the statute as it could have been by deed; and with no safety can the court adopt any other principle.

Suppose A. mortgages to B. land worth one thousand dollars to secure the payment of five hundred dollars. C. has an execution against A. for five hundred dollars, and levies it on his equity of redemption, and procures it all set off to him. In this case B. can foreclose A. and C. C. can pay B. five hundred dollars and become vested with the whole. In the cases put, suppose C.'s execution is two hundred and fifty dollars, and it is levied on an undivided interest in the equity of redemption, in the proportion that two hundred and fifty bears to five hundred. If C. should purchase B.'s mortgage, can A. redeem from C., paying seven hundred and fifty dollars. He cannot, for the property levied upon is irredeemable, and C. has a right to an undivided fourth part of the whole property, subject only to be foreclosed by the mortgagee or his assigns.

For these reasons it appears to this court that Brown, in this case, had no interest in the mortgaged premises after the levy of Punderson's execution; and, therefore, that the judgment of the court below, permitting him to redeem, is erroneous.

Judgment reversed.

This case is cited as authority by Freeman in his work on Executions, sec. 190, and by Herman on Executions, p. 190. In *Allyn v. Burbank*, 9 Conn. 152, referring to this case, it is said: "There it was decided that the levy of an execution upon an equity of redemption gave to the creditor all the rights of the mortgagor in the premises; and that it became by the levy an

irredeemable estate. * * * * The doctrine of *Punderson v. Brown*, so far as I have any knowledge of the practice of our courts on this subject, has been considered as the settled doctrine in Connecticut." See *Franklin v. Gorham*, *post*. The second point decided in this case has only application in those states where there is no statutory right given to a judgment debtor to redeem. This right is now quite generally given; but in Connecticut it does not seem to exist; for the words of the present statute are in substance the same as that which the court considered in this case. See Gen. Stat. 1875, 461, sec. 32.

BULKLEY v. STEWART.

[1 DAY, 120.]

ACTION FOR MONEY PAID ON AN AWARD.—Money voluntarily paid in compliance with an award of arbitrators, cannot be recovered back in an action of *indebitatus assumpsit*.

CONCLUSIVENESS OF AN AWARD.—An award performed will be a sufficient bar to an action for the matters submitted and passed upon, until it is regularly set aside, and in a collateral action its validity cannot be attacked, by alleging fraud in the party obtaining it.

ACTION of *indebitatus assumpsit*. The declaration stated that on the thirteenth of April, 1798, the defendant applied to Stewart and others, to subscribe a policy insuring three thousand dollars, on the cargo of the brig Polly, from Havana to New York, and represented to them that the condition of the vessel as to safety, loss or injury was wholly unknown to him; that Stewart, relying on this representation, subscribed the policy for one hundred dollars; that, in truth, the brig and cargo were at that time wholly lost, which was then well known to the defendant, but of which Stewart and the other underwriters were entirely ignorant; that on the eighteenth of July, 1799, Stewart being then deceased, the defendant applied to the plaintiffs as administrators of said Stewart, and demanded the one hundred dollars insurance; that plaintiffs relying upon the good faith of the defendant, and believing from his representations that the loss was fair, paid the one hundred dollars.

The defendant pleaded in bar that the policy contained a stipulation that in case of any controversy between the underwriters and the defendant, a reference to arbitrators should be made; that in pursuance of this stipulation the question whether the policy was fair, was submitted to two arbitrators, who, having heard the parties, awarded that the underwriters should pay the defendant as for a total loss, according to the terms of the policy; that thereupon the plaintiffs paid the one hundred dollars to the defendant.

The plaintiffs replied, acknowledging the submission and award, but alleged that the award was obtained by a continuance of the same fraud, practised at the time of executing the policy; that defendant solemnly declared before the arbitrators that at the time of effecting the insurance, he had no knowledge of the loss of the brig.

Upon a demurrer to this replication, the county court adjudged the replication sufficient; and that judgment was affirmed, on a writ of error, to the superior court.

A writ of error was, thereupon, brought to this court, to reverse both those judgments.

Daggett and Huntington, for the plaintiff in error.

Ingersoll, for the defendant.

By COURT. To maintain this action, the principle must be assumed, that money paid in obedience to an award of arbitrators, may be recovered back, by impeaching the conduct of the party, in obtaining the award; and, in a form of action not at all applicable to the question raised between the parties. The action of *indebitatus assumpsit* for money had and received, though governed by equitable principles, and not to be sustained in opposition to equity, cannot be substituted for that mode of relief, which belongs only to chancery.

The plaintiffs, in this case, treat the award as void, and the payment, made under it, as furnishing the defendant no ground to retain the money. An award of arbitrators decides the right of the parties as effectually as a judgment at law, or a decree in chancery; and is as binding, until it be regularly set aside, or its validity questioned in a proper manner. When it is not made under a rule of court, it may be annulled by a decree in chancery, on a bill showing corrupt practices of the arbitrators or parties, or the mistake of the former, or any accident, or proper ground for a new trial, attending the case of the losing party: 2 Eq. Ca. Ab., tit. Award. But he can never leap over it, treating it as void, and litigate his right anew, by commencing an action as if it had not been made; and, in a collateral manner, attack its validity. When not complied with, it shall, in some cases, furnish a rule of damages in an action brought on the original claim. If, however, in such cases, there are any circumstances which would be a sufficient objection, in point of law, to an award, it will be open for the parties to show it at the trial: *Bailey v. Lechmere*, 1 Esp. 377.

In the case at bar, whatever fraud may have been practised by

Bulkley in effecting the policy, it was submitted to and awarded upon by the arbitrators. The parties were at liberty to submit the controversy, on such terms as to them seemed proper and eligible. That they agreed to admit each other as witnesses, and mutually interrogated each other, constituted no difference in effect, between an award made on such evidence, and one on that which is ordinarily used in trials. It gave the case the aspect, and the parties the advantages, of a process in chancery; and, it seems, the plaintiffs elected this mode of trial, from the want of common law evidence. It is, therefore, highly improper in them, now to draw in question the integrity of the testimony of their adversary, to which they appealed, and on which they agreed to rely. It would be laying a snare for him, which is not to be allowed: *Stevens v. Thacker*, Peake, 187; *Butler v. Gatling*, 1 Root, 310. The award was acquiesced in and the money voluntarily paid by the plaintiffs. This action does not lie to recover back money voluntarily paid on a claim, which the party disputes, though he pay it, expressly reserving his right to litigate his claim; much less when paid in obedience to an award deciding the claim: *Knibbs v. Hall*, 1 Esp. 84; *Brown v. Kinally*, Id. 279; *Mariott v. Hampton*, 2 Esp. 546; *Cartwright v. Rowley*, Id. 723.

It would be a very dangerous precedent to allow a recovery in this case. The fraudulent conduct of Bulkley before the arbitrators, as alleged by the plaintiffs, cannot change the rights of the parties as settled by the award. It may be the foundation of relief in chancery or of an action at law for that precise wrong; but it does not constitute him, in any sense or to any purpose, the receiver of the money thus paid in compliance with the award to the use of the plaintiffs.

Judgment reversed.

WASHBURN v. MERRILLS.

[1 DAY, 130.]

WHEN DEED REGARDED A MORTGAGE.—Where an agreement was made between parties to a conveyance, that it should be executed as a mortgage deed to secure the payment of a debt, and, by mistake and accident, it was executed as an absolute deed, equity will regard this deed as a mortgage.

PAROL EVIDENCE SHOWING MISTAKE.—Where, by mistake, an absolute deed was made instead of a mortgage, parol evidence is admissible to show the mistake.

PETITION in chancery to redeem certain lands as mortgaged property. The following facts were set forth in the petition and found by the court: On the eighteenth of November, 1784, Solomon Sandford, being indebted to Rachel M'Donald in a certain sum, executed his promissory notes to her for the payment thereof; that a further security being required, it was agreed between them that he should execute to her a mortgage deed of two tracts of land as security for the debt; that on the same day he executed to her a deed of said land, which was intended to be drawn and executed as a mortgage, but by mistake was drawn and executed as an absolute deed; that Sandford did not discover the mistake until some time after the delivery of the deed; that Rachel M'Donald afterward married William Washburn, who, in 1788, forced Sandford out of his possession; that on the eighteenth of February, 1795, Sandford conveyed his right to the premises to Merrills, the petitioner; and that, on the seventh of March, 1801, Washburn and his wife sold the property to the respondents, who had knowledge of the facts, and would not permit the petitioner to redeem.

The respondents pleaded the statute of frauds and perjuries, with an allegation that there was no note or memorandum in writing of the agreement.

On the trial of the cause, the petitioner offered witnesses to prove the mistake, which was objected to by the respondents; but the objection was overruled and the testimony admitted, whereupon an exception was taken. The court decreed in favor of the petitioner, a redemption of the land, upon his paying the principal and interest due on the notes and costs of suit.

Daggett and Allen, for the plaintiffs in error, contended: 1. That the deed being absolute, the possession of Sandford was the possession of the grantee, which, with the actual possession, was continued more than fifteen years; 2. That the allegation of mistake and accident is insufficient: 1 Fonb. Eq. 188; *Langley v. Brown*, 2 Atk. 203; *Harvey v. Harvey*, 2 Ch. Ca. 180; *Joynes v. Statham*, 3 Atk. 357; *Baker v. Paine*, 1 Ves. 456; 3. That this being a parol agreement cannot be introduced.

Smith and Gould, for the defendant in error, contended that a mistake in an instrument is always a ground of relief in chancery. *Joynes v. Statham*, 3 Atk. 358; *Shelburne v. Inchiquin*, 1 Bro. Ch. Ca. 341; 1 Pow. Con. 432; *Crosby v. Middleton*, Prec. Ch. 309; *Baker v. Paine*, 1 Ves. 459; *Simpson v. Vaughan*, 2 Atk. 31; *Henkle v. Royal Exchange Assurance Company*, 1 Ves.

318; *Pitcairn v. Ogbourne*, 2 Ves. 376; *Chapman v. Allen*, Kirby, 399 (1 Am. Dec. 24); *Matson v. Parkhurst*, 1 Root, 404; *Cook v. Preston*, 2 Id. 78.

By Court. The judgment affirmed.

See *Ross v. Norvell*, 1 Am. Dec. 422, and note, where the same subject was considered.

STEWART v. WARNER.

[1 DAY, 142.]

JUDGMENT OF A FOREIGN COURT OF ADMIRALTY.—The sentence of a foreign court of admiralty is conclusive, and cannot be impeached elsewhere until it is regularly set aside in the country where it was delivered.

ACTION of trover for the conversion of the brig *Matilda*. The general issue was pleaded, and on the trial it was admitted that the vessel was formerly the property of the plaintiffs, who sent her on a voyage to the West Indies in March, 1799. The defendant relied upon a condemnation of the vessel by the tribunal of commerce and prizes, sitting at Basse Terre, in the island of Guadaloupe, under the jurisdiction of the republic of France. To invalidate this condemnation, the plaintiffs offered the deposition of the master of the vessel to prove that the condemnation was procured by the fraudulent conduct of the defendant. The defendant objected to the admission of the deposition as evidence, but the objection was overruled; whereupon an exception was taken.

A verdict was found for the plaintiffs.

The admission of the deposition in evidence was assigned as cause of error.

Ingersoll and Hosmer, for the plaintiff in error, argued that the admission of this deposition involved the question how far nations considered themselves bound by decrees of admiralty, and contended that the determinations of all courts in every country consider them as conclusive, with the exception of their proceeding on partial ordinances, and will not inquire into their merits. *Park*, 353; 6 Vin. Ab. 535; 1 Com. Dig. 392; 2 Woodeson, 456; 3 Bla. Com. 108; *Peake's L. Ev.* 46 to 54; *Broom's case*, 1 Salk. 82; *Collect. Jurid.* 101, 103.

In *Hughes v. Cornelius*, 2 Show. 242; S. O. T. Raym. 473; S. O. Skin. 59, trover was brought, as in this case, and the court

unanimously considered the decree as conclusive. In *Bernardi v. Motteux*, Doug. 575, the sentence of condemnation was declared conclusive as to everything within it. So also, *Barzillai v. Lewis*, Park, 358; *De Sousa v. Ewer*, Park, 360; *Geyer v. Aguilar*, 7 T. R. 681; *Christie v. Secretan*, 8 T. R. 192; *Calvert v. Bovill*, 7 T. R. 527.

But if it is ever proper to give fraud in evidence against a decree of admiralty, the testimony must show that the fraud had weight in procuring the adjudication. And although the defendant may have practiced a fraud upon the master of the vessel, his deposition shows none upon the court in obtaining the decree.

Edwards and Daggett, for the defendant in error, contended that though the sentence was conclusive against the parties to it, yet that in this case it was competent to prove that Stewart, who justified under it, procured it to be obtained by fraud.

By COURT. The question in this case is, whether a sentence of condemnation of a foreign court of competent jurisdiction can be avoided on account of fraud practiced in obtaining it. when thus called in question collaterally in this country; and the court are of opinion that such sentence cannot thus be called in question, but must remain in full force until avoided in some regular mode in the country where it passed.

Judgment reversed.

CHESTER, ALLEN and AUSTIN, Ass'ts, dissenting.

See the cases of *Vandenhoevel v. The United Insurance Co.*, 1 Am. Dec. 180; *Messier v. Amery*, Id. 316; and *Jenkins v. Putnam*, Id. 594, where the same question is considered. The first of these cases holds a different rule from that decided in this case.

MEAD v. TOMLINSON.

[1 DAY, 143.]

COPARTNERSHIP, ACTION BY.—An action is not maintainable in favor of a copartnership upon a written contract entered into by one of the partners, deceased, in his individual name only.

ACTION brought upon certain covenants in a charter party. The plaintiff, Mead, averred that at the time of executing said charter party, he and one Lockwood were merchants in partnership; that they were bound by the contracts of each other; that all business transacted by either, under whatever name,

was, in fact, transacted on their joint account, and for the equal benefit of both; and that this charter party was entered into by Lockwood with the defendant and another, since deceased, for the joint benefit of himself and the plaintiff; which fact was well known to the defendant.

The defendant, after having prayed oyer of the charter party, from which it appeared that it was signed by Lockwood only, pleaded in abatement that the charter party was entered into by defendant and one Coggshall on the one part, and by Lockwood on the other, and by no other persons whatever; and that the suit, therefore, could be brought only in the name of Lockwood's administrator, and not by the plaintiff as surviving partner.

The superior court sustained the plea of abatement, and a writ of error to this court was taken.

Mills and Smith, for the plaintiff, contended that the copartnership being established, and it being shown that the acts of each were binding upon both, enough was shown to entitle the plaintiff to this action. *Boson v. Sandford*, 3 Lev. 258; *Hoare v. Dawes*, Doug. 371; *Willett v. Chambers*, Cowp. 814; *Harrison v. Jackson*, 7 T. R. 207; *Coope v. Eyre*, 1 H. Bl. 37; *Arden v. Sharpe*, 2 Esp. 524.

Edwards contended, for the defendant, that this being an action of covenant, it could not be supported by Mead, on an instrument executed solely by Lockwood. However the rule may be in the case of actions against dormant partners, this action is not maintainable. The contrary doctrine would destroy the individuality of partners and render them incapable of a separate obligation.

By Court. The judgment affirmed.

This case is cited as authority by Parsons on Partnership, sec. 105 (n.) f. and h.

POLLARD v. LYMAN.

[1 DAY, 156.]

ANSWER TO BILL IN EQUITY, WHEN CONCLUSIVE.—The answer of a respondent to a bill in equity praying for a disclosure is conclusive upon the petitioner as to the truth of its statements.

RELIEF IN EQUITY.—Mere loss in a bargain, loss resulting not from fraud, nor the failure of a warranty, but from bad calculation or the want of vigilance, is not a ground for relief in equity.

SAME.—Mere inadequacy of consideration, where the stipulated consideration is actually received, affords no ground of relief in equity.

IMPLIED WARRANTY AS TO LAND.—The doctrine of implied warranty applies only to articles susceptible of a standard quality, or which are sold by samples, and does not extend to lands which have no standard quality.

PETITION in chancery to the superior court, filed by Joseph Lyman, and certain others, against one Robert Pollard and George Pickett, respondents, which stated that on the fifth of December, 1795, the petitioners severally advanced to William Ely certain sums of money, amounting with the sum to be furnished by him to fourteen thousand four hundred and eleven dollars, and authorized him, by power of attorney, to purchase such good unlocated or uncultivated lands in Virginia as he thought would best promote the interest of the person advancing the money; he was also authorized, in case he deemed it for the interest of his principal to bind him to pay his proportional share of the purchase money; that the petitioners severally gave orders to Ely to take all conveyances of the lands he should purchase in the names of Jonathan Dwight, John Hooker, George Bliss, and Gideon Granger, Jr., which they were to hold for the benefit of the proprietors; that Ely proceeded to Virginia and effected purchases of lands lying in that state, for the benefit of the petitioners, according to the authority given him; that while there, the respondents applied to him and proposed to sell him one hundred and fifty thousand acres of land, which they represented as lying in Wythe county, Virginia, and described the same by particular metes and bounds; that to induce Ely to purchase, they affirmed that they had a good and indefeasible title to the lands, that they were in a well settled country, and had been located early, when there were large tracts of land vacant in that part of the state, and when the person locating had a great opportunity of selecting valuable lands, and that said tract of one hundred and fifty thousand acres was of great value; as a further inducement the respondents showed Ely a map with various fine rivers and streams delineated thereon, as watering and greatly fertilizing the land, all leading through the same and connecting with other great rivers in the state, thereby affording easy access to said lands, and convenient communication therefrom with other parts of the state, which map, the respondents affirmed to Ely, was a true and just representation of the lands and the waters upon them; that Ely, induced by these representations, and believing them to be true, on the twelfth of March, 1796, pur-

chased of the respondents said tract of land, for which he agreed to give sixteen thousand five hundred dollars, payable in installments of five thousand five hundred dollars, and to secure the payment thereof, on the twenty-eighth of March, 1796, executed three bonds for five thousand five hundred dollars each, payable on the tenth of June, 1796, twelfth of March, 1797, and twelfth of March, 1798, respectively; and that on the said twelfth of March, 1796, the respondents undertook to convey said lands to Dwight, Hooker, Bliss, and Granger, for the benefit of the petitioners. The petitioners also stated that they had paid two installments, amounting with interest to thirteen thousand and fifty-seven dollars and fifty cents; and that on the third bond respondents had brought a suit before the county court, which they were trying to press to judgment. The petitioners then averred that the respondents never had any legal title to the one hundred and fifty thousand acres of land, or any part thereof; that the lands were of no value; that they were altogether different from the description given to Ely at the time of the purchase; that the lands were inaccessible mountains, incapable of settlement; that the map shown to Ely was a totally false representation with reference to the waters upon the tract, and that many of the streams there delineated never existed; and that these facts the respondents well knew, but concealed from Ely with the intention of decoying him into the purchase of said lands.

The bill concluded with a prayer that the respondents might be compelled to disclose on oath, all their knowledge with respect to the matters stated, and asked for a perpetual injunction on the bond in suit, and for a restoration of the money that had been paid on the other bonds, together with interest.

The disclosure was ordered, and having been regularly made before commissioners in Virginia, was returned to the court and became part of the record. In the disclosure, the respondents say that they became acquainted with Ely in the year 1795; that in the summer of that year, Ely passed through Wythe county, and upon his return had represented to respondents that the lands in that county were very valuable; that respondents, having a tract of one hundred and fifty thousand acres of land in that county which they had purchased for a valuable consideration, offered to sell the same to Ely, informing him that they knew nothing of the quality of the land, nor had they or either of them any knowledge of that part of the country, and undertook to give a deed in fee-simple with a general warranty on

receiving a satisfactory price; that in order to satisfy Ely with respect to the shape and situation of said tract, they procured from the register of the land-office a copy of the plan, and a certificate of the survey as returned by the surveyor of Wythe county; that said plan contained the shape and boundaries of the tract in question, the water-courses which passed through it, and the date of the entry and time when the survey was made; that they showed this map to Ely, and if there were any inaccuracies in it, respondents were not to blame. They deny that they ever informed Ely as to the actual or intrinsic value of the land; but from the solicitude expressed by him to become the purchaser thereof, and from his having passed through Wythe county, they believed him possessed of much better information than that which they possessed. They aver that Ely made no inquiry as to the situation, quality and value of the land, but was anxious as to the title only. They admit the execution of the deed in fee-simple with general warranty, and the receipt of the bonds; and conclude by denying all fraud and combination or knowledge thereof.

To this answer the general replication was filed.

The superior court thereupon proceeded to hear the case and then decreed as follows: "The court do find that said Ely did purchase said tract of land containing one hundred and fifty thousand acres, of said Pollard and Pickett, as stated in said petition; that the petitioners did severally furnish money for said Ely to pay it to him in the proportions and upon the terms and under the agreements set forth in said petition, and are interested in said land in proportion severally to the sums of money by them advanced as aforesaid. And the court do find that said lands sold by the respondents to said Ely were represented and held out to said Ely by the respondents, at the time of the purchase, as being of great value in point of quality, and their relative situation with other lands in said county of Wythe, which said Ely had viewed, and which were valuable for settlements. And the court do find that a plan or survey of said lands sold by the respondents to said Ely, importing the same to be of good quality and situation, was shown to said Ely by said Pollard and Pickett, at the time of said sale as is set forth in said petition. And the court do find that the said plan or survey was not made by any actual survey; and that the lines of said tract sold to said Ely as aforesaid, were never run out nor surveyed; and that the said plan or survey imported on the face of it a falsehood. And the court do find that the lands

sold by the respondents to said Ely, as set forth in said petition, were not, at the time of said sale, and are not now of any value whatever. And the court do find that the said three bonds mentioned in said petition, were given by the petitioners as the consideration of said purchase made by said Ely of the respondents; and that two of said bonds have been paid; and that a suit is now depending on the other bond, which hath not been paid, in the county court of Hartford county, all as stated in said petition. And the court find that as to any defect in the title derived to the petitioners from said purchase of Pollard and Pickett, the petitioners have adequate remedy at law upon the covenants in said deed from said Pollard and Pickett, it appearing to the court that said Pollard and Pickett are able to respond any damages that may be recovered of them in any suit upon the covenant of said deed.

“Whereupon, it is ordered and decreed by this court that said Pollard and Pickett, their counsel and attorneys, be perpetually enjoined from further proceedings in said suit upon said bond, in said Hartford county court, and from commencing and prosecuting any other suit upon said bond. And it is further decreed and ordered by this court, that upon the petitioners executing a deed to said Pollard and Pickett, their heirs etc., conformable to the laws of said state of Virginia, releasing to said Pollard and Pickett, their heirs etc., all the right and title to said lands purchased of said Pollard and Pickett, as aforesaid, by said Ely, which the petitioners derived from said Pollard and Pickett by virtue of said conveyances from them, as stated in said petition as aforesaid, and lodging the same with the clerk of this court, on or before the seventeenth of February, 1803, to be by said clerk delivered to said Pollard and Pickett; upon their complying with this decree, they, the said Pollard and Pickett shall, on or before the first of July, 1803, deliver up said bond on which said suit is brought, to the clerk of this court, to be cancelled, and shall pay to the clerk of this court for the use of the petitioners, the sum of fourteen thousand eight hundred and seventy-six dollars and fifty cents and interest thereon from this time till the same shall be paid; and upon the failure of said Pollard and Pickett to comply with this decree upon the condition and by the time aforesaid, they shall forfeit and pay to the petitioners the sum of thirty thousand dollars, to be recovered of them, the said Pollard and Pickett, according to law. And it is further decreed by this

court that petitioners do recover of the said Pollard and Pickett their costs."*

The respondents brought a writ of error to this court and assigned the general errors.

Benson (of New York) and *Daggett*, for the plaintiffs in error contended:

1. That the superior court could not by law find the facts which they declare they found. The finding contains facts not alleged by the petition or confessed in the answer, as well as facts expressly denied in the answer. But the answer is conclusive upon the petitioners, and no evidence can be admitted to contradict it. *Butler v. Gatling*, 1 Root, 582, 2 Swift, 475.

2. The facts which appear to be found do not warrant the decree. No fraud on the part of the respondents, or knowledge that the representations made by them were false, though charged in the bill, is found by the court. A mere falsehood held out to the petitioners without any fraudulent intention, and without any greater knowledge concerning the thing contracted for than the petitioners themselves had, is not sufficient to entitle them to relief. 1 Pow. Con. 141. This was a bargain of hazard; it was the evident intention of the parties to speculate. Though the event showed that the price was far above the value of the land, yet this affords no ground of relief.

3. The petitioners had adequate remedy at law. *Willet v. Overton*, 2 Root, 338 (1 Am. Dec. 72); 2 Com. 324; Mitf. 104, 105, 106; *Lathrop v. Bennet*, Kirby, 185.

Edwards and Hosmer, for the defendant in error.

By Court. The disclosure, which admitted none of the facts alleged as fraudulent and denied them all, was conclusive with respect to those facts. Chancery power to compel a disclosure has, by the practice of this State from the beginning, been limited to the case of there being no other evidence. To have extended further would have been an unnecessary departure from the common law, and an unnecessary exposure to imminent danger of perjury. A plaintiff, therefore, to entitle himself to a discovery, avers in his bill that the facts respecting which he prays a disclosure rest solely in the knowledge of the

* The editor of Day's reports remarks as follows: "This decree was drawn by the counsel, agreed to on both sides, and on such agreement passed by the court at nine o'clock at night, at the moment of their rising. It is not well drawn. Judge Trumbull proposed to the parties to continue the cause, that the court might have time to examine it; but the counsel for the petitioners insisted on its being passed."

defendant or of the defendant himself; and to permit him, after disclosure is obtained, to produce other evidence in proof of those facts, is to permit him to falsify himself and to trifle with the court and the conscience of his adversary.

The court having found that Pollard and Pickett were able to respond to any damages that might be recovered of them in any suit upon the covenants of the deed, if they had been broken, the question of the title was laid out of the case. They further found that the lands sold to Ely were, at the time of the purchase, represented and held out to him by the respondents as being of great value in point of quality and their relative situation with the lands in the county of Wythe, which he had viewed, and which were valuable for settlements. If "represented and held out as being of great value" mean anything more than the exhibition of the plan which is included in the next finding; if it mean that Pollard and Pickett affirmed the lands to be of great value, or that they were located in the midst of a well settled country; the affirmations alleged in the bill and which the disclosure had denied; the finding must have been without evidence or upon evidence which was inadmissible and inoperative.

The only defects or misrepresentations of the plan specifically charged in the bill were, that it delineated many water-courses well interspersed and connected with rivers of extensive communication, some of which water-courses did not, in fact, exist, and others were misplaced; and that it represented the land to be of great value when in fact it was of no value. That the plan represented the land to be of great value, otherwise than by a demarcation of water-courses which might create a presumption of fertility and of easy access, was not alleged. Nor does it appear from the finding of the court that the demarcation of the water-courses was at all incorrect; the finding is silent with respect to them. And as to any facts found respecting the plan, which were not charged so specifically that the adverse party had notice to contest them, it is not material what they amount to. It may be proper, however, to notice that whatever misrepresentation the plan may have contained, it was not found that Ely was induced by it to purchase, nor that Pollard and Pickett knew it to be incorrect, or had any agency in making it or procuring it to be made; and indeed, the reverse of all these facts is apparent from the disclosure, so that the allegation wholly fails.

The court further and finally found that the land was of no

value. Mere loss in a bargain, loss not resulting from fraud nor the failure of a warranty, but from bad calculation or the want of vigilance, is not a ground for relief. It could not be admitted as a ground without rendering all express contracts futile. As to the doctrine of implied warranty that the article sold is of the ordinary quality of articles of its kind, or equal throughout to the sample seen, it applies only to articles susceptible of a standard quality, or which are sold by samples, and does not extend to lands which have no standard quality, and must depend for their value on a variety of circumstances, none of which are reducible to a common measure. Nor does the doctrine of the failure of the consideration reach this case. It reaches no case where the purchaser obtains the article contracted for, and the purchase was not induced by fraud, nor the quality of the article warranted. It is not having the stipulated consideration, and not its want of value, which the doctrine respects. In this case it must be understood, as there is nothing either expressed or implied to the contrary, that the purchaser took upon himself the risk of the quality or value of the land which he improvidently purchased unseen. And as to fraud, it does not appear that the seller practiced any address whatever; though it is not every species of address that vitiates a contract. If the address be such only as the purchaser, by due diligence and circumspection, might guard himself against, that is to say, such diligence and circumspection as in the ordinary course of business usually accompany similar transactions, he is without remedy.

There not appearing, then, from the record any sufficient ground to warrant the decree of the superior court, it is reversed.

DISCOVERY.—It is a well-settled rule in equity that when a bill seeks a discovery the plaintiff must distinctly allege that he is unable to prove the facts by other testimony: 1 Story Eq. sec. 74; *Gelston v. Hoyt*, 1 Johns. Ch. 543; *Seymour v. Seymour*, 4 Id. 409; *Duvalls v. Ross*, 2 Munf. 290, 296; *Bass v. Bass*, 4 H. & Munf. 478; *Dickinson v. Lewis*, 34 Ala. 638; *March v. Davison*, 9 Paige, 580.

If the answer wholly denies the matter of fact which the plaintiff seeks to discover in the bill, the bill must be dismissed, as the denial leaves the court no jurisdiction: 1 Story Eq. sec. 74; *Russell v. Clark*, 7 Cranch. 69; *Robinson v. Gilbreth*, 4 Bibb. 184; *Overton v. Searcy*, Cooke, Tenn. 36. This is now otherwise by statute in Connecticut. It is provided that "When the plaintiff, in a bill in equity, shall require of the defendant a discovery on oath respecting the matter charged in the bill, the disclosure by the defendant shall not be deemed conclusive, but may be contradicted like any other testimony according to the practice in equity: Gen. Stat. 1875, 440.

INADEQUACY OF CONSIDERATION.—Mere inadequacy of consideration by itself, and disconnected from all other facts is not a sufficient ground for setting aside a contract: *Judge v. Wilkins*, 19 Ala. 765; *Chaires v. Brady*, 10 Fla. 133; *Maddox v. Simmons*, 31 Ga. 512; *Holmes v. Fresh*, 9 Mo. 201; *Potter v. Everitt*, 7 Ired. Eq. 152; *Mann v. Betterly*, 21 Vt. 326; *Whitefield v. McLeod*, 1 Am. Dec. 650. But gross inadequacy of price and inequality in the position of the contracting parties is a ground of equitable relief: *Gifford v. Thorn*, 9 N. J. Eq. 702. On this point, Story, 1 Eq. Juria. sec. 244, 246, says: "Mere inadequacy of price, or any other inequality in the bargain, is not, however, to be understood as constituting *per se* a ground to avoid a bargain in equity. Still, however, there may be such an unconscionableness or inadequacy in a bargain, as to demonstrate some gross imposition or some undue influence, and in such cases courts of equity ought to interfere upon the satisfactory ground of fraud. But then such unconscionableness or such inadequacy should be made out as would (to use an expressive phrase), shock the conscience, and amount in itself to conclusive and decisive evidence of fraud. And where there are other ingredients in the case of a suspicious nature, or peculiar relations between the parties, gross inadequacy of price must necessarily furnish the most vehement presumption of fraud." There is a very accurate statement of the law in *Robertson v. Smith*, 11 Tex. 211, holding that where a party has made a disadvantageous contract from carelessness and inattention, and when there has been no mistake of fact or fraud, such party cannot be relieved from the contract; a principle identical with that laid down in *Pollard v. Lyman*.

GRISWOLD v. BROWN.

[1 DAY, 180.]

ACTION OF TRESPASS SURVIVES TO ADMINISTRATOR.—An action of trespass for entering upon the land and burning the mills of the intestate, in his lifetime, survives to the administrator.

AN ACTION of trespass was brought by Nathaniel Griswold against Brown and Moore, for entering the plaintiff's close and burning his mills. The suit was prosecuted to a final judgment before the superior court, and a verdict obtained against both the defendants. A motion for a new trial was thereupon made, during the pendency of which Griswold, the plaintiff in the original action, died; and a citation issued to friend Griswold, the administrator, to appear and defend. The administrator appeared and pleaded that the action in which a new trial was sought, being an action of trespass, could not be prosecuted by an administrator, and therefore the petition for a new trial ought to be dismissed. The court adjudged the plea insufficient and granted a new trial. On the second trial the defendants pleaded severally not guilty, and a verdict was found against Moore and in favor of Brown.

The administrator brought a writ of error and assigned as errors: 1. That the superior court proceeded to hear the petition, and to grant a new trial after the death of the plaintiff in the original action; 2. That the said court proceeded to the second trial, committed the case to the jury, and rendered judgment therein.

Ingersoll and Edwards, for the plaintiff in error, contended that the petition was, by the death of Nathaniel Griswold, abated, and could not be revived against the administrator. The original action being for a trespass on a freehold estate, it could not be prosecuted by the personal representative of the plaintiff after his decease. *Hambly v. Trott*, Cowp. 376; 2 Bac. Ab. 439, 440; 11 Vin. Ab. 123; Stat. Edw. III.

Goodrich and Dana, for the defendants in error, contended that it was competent for the court to proceed in the petition after the death of Nathaniel Griswold, and to grant a new trial. The original action was for damages, not for title, and had the plaintiff died before the trial, the action would have survived. The maxim, *actio personalis moritur cum persona*, has not a general, much less a universal application. *Hambly v. Trott*, Cowp. 375. It has not the same application as to torts done to and done by the testator. 2 Bac. Ab. 445; *Berwick v. Andrews*, 1 Salk. 314, S. C. 2 Ld. Raym. 971; *Williams v. Carey*, 1 Salk. 12, S. C. 1 Ld. Raym. 40; *Crossier v. Ogleby*, 1 Str. 60; *King v. Ayloff*, 1 Salk. 295; Esp. Dig. 295; *Rutland v. Rutland*, Cro. Eliz. 377, 378; Went. Ex. 65; Tol. Ex. 395. The principle of the statute, 4 Edw. III. S. 6, by which an action is given to executors for goods taken out of their testator's possession, extends to cases of damages done to the realty. *Lucy v. Levington*, 1 Vent. 176; *Justice Moreton's case*, Id. 80; *Smallwood v. Coventry*, Esp. Dig. 439.

By Court. The judgment affirmed.

See *Middleton v. Robinson*, 1 Am. Dec. 596, and *Acery v. Moore*, Id. 599, for decisions on the same question.

BOSTWICK v. LEWIS.

[1 DAY, 250.]

FRAUD AND CONSPIRACY IN SALE OF REAL ESTATE.—The plaintiff was induced to buy and take a warranty deed of certain lands from N. by the fraudulent and false representations of N. and others, who had combined together for the purpose, that N. had a good title, and that the lands were of good quality; it was held that an action on the case would lie against all the confederates for this fraud, on proof that the title to a part of the land was never in N., and that the residue was of no value.

ACTION on the case. The declaration substantially stated that in January, 1796, the defendants (the appellants in this court) affirmed to the plaintiff that Austin Nichols was the owner and proprietor in fee of a tract of land in Virginia, containing forty-five thousand acres; and well knowing that he was not the owner, and that the land was of no value, but mountainous and rocky, and unfit for cultivation, they conspired together to induce the plaintiff to buy a portion of the said tract, at twenty-five cents per acre; and intending to cheat and defraud the plaintiff, and to share among themselves the profits, did, to carry out the purpose aforesaid, severally and respectfully affirm and represent to the plaintiff, that Nichols was the owner of the tract, and that the same was of an excellent quality, and well adapted to agricultural purposes. And in pursuance of an agreement and conspiracy entered into by the defendants, and to induce the plaintiff to purchase, Ebenezer Smith and Daniel Smith, two of the defendants, did falsely affirm to the plaintiff, that they had had great opportunities for informing themselves of the title and quality of the land, and that it was of an excellent quality, worth more than twenty-five cents per acre, and could not be purchased for less, and that the title of Nichols was good and valid. And said Bostwick, in pursuance of an agreement, combination and conspiracy, made by the defendants, pretended and ostensibly agreed, to become a purchaser of one-fourth of said tract, at twenty-five cents per acre; and proposed to the plaintiff to join in a purchase of said tract, at the said price, and represented that it was of an excellent quality, and that Nichols's title was good and valid; that he had exerted himself to find the truth respecting it, and the land was really worth twenty-five cents per acre, and unless purchased immediately the opportunity would be lost; and said Bostwick presented to the plaintiff a pretended map, and

falsely and fraudulently affirmed that the map contained a true description of the land, from which map it appeared the land was good lowland, well fitted for agricultural purposes; and the plaintiff relying upon the affirmations and representations aforesaid, did, on the twelfth of February, 1796, purchase of said Nichols, the one fourth part of the tract, and paid for the same the sum of two thousand eight hundred and twelve dollars and twenty-five cents, which sum the defendants divided between themselves. And said Nichols, in pursuance of said agreement and combination, did give to the plaintiff and said Bostwick, and two others, a deed of said tract of land. And said Nichols had no title at the time of executing the deed, and such Bostwick never was a purchaser of any part of said land, but ostensibly, and to decoy the plaintiff, and in pursuance of said combination, nor did he ever pay anything for said land, but said Nichols, as soon as said deed was executed, discharged Bostwick from the payment of anything on account of said land. And the plaintiff, in consequence of said conspiracy, has lost all the money which he paid said Nichols, and is injured, etc.

On the trial in the superior court, Nichols suffered a default, and the other defendants severally pleaded not guilty. The plaintiff exhibited in evidence a deed of the described land, the execution and acknowledgment of which were admitted. He then offered in evidence certain patents in favor of Jacob Pate and others, to prove that at the time of the execution and delivery of the deed, about nine thousand acres had been taken up, surveyed and granted by Virginia to Pate and others, and that the title to such was not in Nichols, but in these parties, and that Nichols had no right to sell the same. The plaintiff offered to prove by other testimony, that the remainder of the land was of no value. The defendants objected to any proof of a defect of title; because the plaintiff had his remedy by a suit upon the covenants in the deed. The court admitted the patent in evidence on the ground that by such testimony the plaintiff might evince that the land attempted to be conveyed by said deed, exclusive of the nine thousand acres, was of no value. A verdict was found and judgment rendered against two of the defendants; and the present appeal was taken on the ground that the testimony objected to was improperly admitted.

Ingersoll and Smith, for the appellants, contended that the evidence of the patents ought not to have been admitted. The remedy of Lewis was upon the covenants in his deed, which

covenants embody the whole contract and stipulations between the parties. A party can obtain no more damages in an action on the case than in an action on the covenants, and in neither is it necessary to show the defendant knew he had no title. An action of fraud is sustained on the ground that a title has been given which is worth nothing. The deed having covenants of seisin and warranty, no action would lie except on the covenants until it was shown Nichols was bankrupt; and no authority could be shown where such an action was sustained in Great Britain. In this case there are other persons not parties to the deed. The action will not lie against them and Nichols, for there is another remedy against him; and therefore no evidence can be produced to show that the other defendants combined with Nichols. If such an action as this would lie, there would be two concurrent remedies for the same thing.

The evidence offered was wholly irrelevant; for showing that the title to part of this land was not in Nichols, did not tend in the least to show that the remainder was of no value. No cause of action is shown. The strongest allegations are that the defendant represented the land as excellent, well worth twenty-five cents an acre. This is merely an opinion; no fact is affirmed. If a man declares that there is a mountain of salt, or lake of whisky upon his land, he affirms a fact, and if false, an action will lie; but if he states that he has an excellent horse well worth fifty dollars, and the horse is not worth that sum, no action will lie, for the maxim *caveat emptor* will apply; for the purchaser might have examined and judged for himself. An extravagant representation of the value of a small farm in this State would not be a ground of action; and the reason of the case is the same if the land lies in Virginia.

The law will not encourage the indolent, nor pay the buyer for shutting his eyes. In *Pasley v. Freeman*, 3 T. R. 56 Buller, J., says, "the buyer of land is at his peril to see to the title." Mere affirmations, unaccompanied with fraud, will not furnish a ground of action. *Parkinson v. Lee*, 2 East. 314. There have been decisions in the superior court sustaining a recovery for fraud in the sale of lands. A state of things has existed which induced that court to adopt principles which in more settled times would never have been recognized. But these opinions have never been sanctioned by this court; and the case of *Pollard v. Lyman*, ante, 63, so far as it went, was in opposition to the principle contended for.

Edwards and Daggett, for the respondents, insisted that the testimony was properly admitted; though the reason given for its admission may be incorrect.

Notwithstanding Lewis had a warranty deed, and Nichols was responsible, the evidence was proper; for damages are not now claimed of Nichols solely, but of him and others, for combining with them to defraud the plaintiff. Lewis took this deed, because Bostwick and others represented to him facts which did not exist; and now it is urged as a reason why they should be liable that they did actually induce the plaintiff to receive the deed. Having a right of action against all, the plaintiff is not bound to proceed against one only.

He has a right to this action, because in this greater damages may be recovered than on an action on the warranty. The rule there is the consideration and interest. [Not in Connecticut, see *Horsford v. Wright*, 1 Am. Dec. 8.] In actions of fraud, there is no established rule of damages; the jury give damages according to their judgment. So the testimony was proper to increase the damages. The deed introduced is nothing more than evidence of a bargain and sale. But it is said, there are no allegations in the declaration, which authorize a recovery. It is stated that the defendants combined to cheat the plaintiff; that they severally affirmed that the land was of an excellent quality, not mountainous or rocky, well fitted for agricultural purposes; that Bostwick showed him a map, on which the land appeared to be intervale, well adapted for improvement. Representations more strong could not be made. But it is said no action can be maintained for fraud in the sale of land, and this is represented to be the law of Great Britain, and the doctrine of our ancestors. The case of *Rosswell v. Vaughn*, Cro. Jac. 196, is the only case which goes to prove the doctrine advanced in any degree, and that has been long exploded. In *Risney v. Selby*, 1 Salk. 211, where the seller affirmed that he received a certain rent, and it proved to be less, the plaintiff recovered. It is admitted that actions of this kind have been supported in the superior court; and the reasons in *Pollard v. Lyman*, in this court, do not counteract these decisions. In *Norton v. Hatheway*, they must have been recognized. The principles of that case were the same as of this, although it was not so strong a case. If then it were clear that such actions could not be sustained in Great Britain, our courts have gone too far to recede.

By Court. The judgment was affirmed.

The case of *Norton v. Hatheway* upon a similar point, was decided in the supreme court of errors, in 1800, of which the following account is given in a note in 1 Day, 255: The original action was brought by Joshua Hatheway against Philo Norton, Austin Nichols, and four others, for fraud in the sale of Virginia land. The declaration charged the defendants with having entered into a combination to defraud the plaintiff. To effect their purpose, two of them applied to the plaintiff, and proposed to sell him 25,000 acres of land, lying in Russell county in Virginia; and to induce him to give a great price for the same, they affirmed to him that the land was of an excellent quality, having a rich soil, and covered with valuable timber; that it was well worth half a dollar per acre, and that the title was unquestionable. The plaintiff, relying upon these representations, agreed to purchase said land, and to pay for the same two shillings threepence per acre. The two defendants abovementioned then executed a bond to the plaintiff, in the penal sum of six thousand pounds, either to procure for him from the commonwealth of Virginia a patent of the land, or to give him their warranty deeds thereof, within a specified time, and the plaintiff on his part, gave his bond, in the penal sum of six thousand pounds, conditioned for the payment of the purchase money amounting to two thousand eight hundred and twelve pounds ten shillings. These defendants procured within the specified time, and presented to the plaintiff a patent, purporting to be a grant of twenty thousand acres of land from the commonwealth of Virginia, signed by the governor, which the plaintiff refused to accept. The representations made by them to the plaintiff were false; the land was not of a good quality; the defendants had no title to it; and Virginia had none at the time said patent issued. The defendants pleaded severally not guilty; issue was joined to the jury; and a verdict was found; and judgment rendered for the plaintiff. The principal exception, taken in error, was, that no legal ground of damages appears in the declaration. The authority of the case of *Bostwick v. Lewis*, is not shaken in Connecticut. In *Sherwood v. Salmon*, 2 Day 142, the court took different ground, but this decision was overruled in a suit in equity between the same parties in 5 Day, 448, and the authority of *Bostwick v. Lewis* and *Norton v. Hatheway* affirmed. And here let it be observed, that the learned editor of the American Reports erroneously cites *Sherwood v. Salmon* from the 2nd of Day, overlooking the fact that it has been overruled. 15 Am. Rep. 385. Its authority has in several cases been recognized by other courts. Thus it is cited in *Wardell v. Fosdick*, 13 Johns. 325; in *Coon v. Atwell*, 46 N. H. 510; and in *Peabody v. Phelps*, 9 Cal. 213.

FRAUD IN SALE OF REAL ESTATE.—Questions of fraud arising out of the sale of real estate, have given rise to much discussion in our courts; and it must be admitted, that the decisions still differ regarding what affirmations or representations in the sale of real estate, are actionable as being fraudulent. Before examining the cases in reference to this subject, let us first lay down a few general propositions, well settled by authority, on the question of false and fraudulent representations as a ground of action, and perhaps the principles of the cases will be more readily apprehended after such consideration.

A representation to be considered fraudulent in law must be made by a vendor in regard to some existent facts within his own knowledge, and in respect to which another acts to his detriment in sole reliance on such representation. Hence an honest statement of a fact made to another about to act on such statement, and who does act to his detriment, will not create a liability on the party making such statement; it must be further shown

that he knew the falsity of his statement. As bearing out this general statement, see 2 Kent Com. 485; Kerr on Fraud and Mistake, Am. ed. 82; *Collins v. Evans*, 5 Q. B. 820, 826; *Barley v. Walford*, 9 Id. 197; *Omrod v. Huth*, 14 M. & W. 651; *Childers v. Wooler*, 2 El. & E. 287; *Mahurin v. Harding*, 28 N. H. 128; *Case v. Boughton*, 11 Wend. 106; *Meyer v. Amidon*, 45 N. Y. 169; *Simar v. Canady*, 53 Id. 298. It is further well settled that mere affirmations as to value, or in respect to any matter which is merely an opinion, probability or expectation, and as to which men may honestly differ, cannot give a right of action for fraud or deceit. In this respect one man's observation and intelligence are as good as another; and a vendee, in such cases, is bound to use his own judgment. So the vendor may exaggerate, puff, or praise at random the goods he is selling, as far as the credulity of the buyer will permit, without being liable for fraud. The common law here adopts the maxim of the civil law, *simplex commendatio non obligat*: Sugden on Vendors, vol. i., p. 3, 14th ed.; *Harvey v. Young*, Yelv. 21; *Ellis v. Andrews*, 56 N. Y. 83; S. C. 15 Am. Rep. 379; *Simar v. Canady*, 53 N. Y. 298; *Tuck v. Downing*, 76 Ill. 71; 2 Kent. Com. 485. But as limiting the proposition first stated, a person will be liable on the ground of fraud when he makes a positive affirmation in respect to a matter, though he may not have any knowledge as to its falsity; his undertaking, as of his own knowledge, to assert the truth of that which he does not know to be true, is a fraud on the party dealing with him, who may then very properly rely and act on his statement. This principle is now well recognized and supported by authority: 1 Story Eq., sec. 193; *Haycraft v. Creasy*, 2 East, 92; *Evans v. Edmonds*, 13 C. B. 777, 786; *Lobdell v. Baker*, 1 Met. 193; *Bennett v. Judson*, 21 N. Y. 138; *Cabot v. Christie*, 42 Vt. 121; S. C. 1 Am. Rep. 331; *Meyer v. Amidon*, 45 N. Y. 169. So a party is held liable for a false representation, where the facts are peculiarly within his own knowledge, and whether he had knowledge or not, it will be presumed he must have, otherwise he is guilty of negligence amounting to a fraud: *Jarret v. Kennedy*, 6 C. B. 319; *Taylor v. Ashton*, 11 M. & W. 401; *Coon v. Atwell*, 46 N. H. 510. Now, while these general principles are admitted, it is claimed that in respect to the sale of real estate, where deeds are given with covenants, they do not altogether apply; for the party suffering damage has his remedy on the covenants in the deed, and he should not besides have a right of action for the deceit or fraud. This was one of the reasons urged against the action in the principal case; and this reason has had much influence in the decision of some of the cases. On this ground, Field, J., in *Peabody v. Phelps*, 9 Cal. 213, held an action for fraud in respect to title would not lie. While this may be true when a person makes a representation on which another acts in the purchase of real property, without any knowledge of the falsity of the representation, thus evincing no intent to deceive; it becomes quite a different question when he knowingly asserts as a fact, or makes a statement which is false to induce another to act, and the latter in reliance on such statement does act to his detriment. An element of turpitude then enters into his conduct; he, in fact, has committed a tortious act, such as the law takes notice of, and for which it gives a remedy in an action of deceit. In the former case, his liability is *ex contractu*; in the latter *ex delicto*. Therefore, it is now well settled that actions for fraud in the sale of real estate will lie notwithstanding the conveyance is made with covenants; but the question is in respect to what representation will fraud be predicated? Here the cases vary.

FRAUD IN RESPECT TO TITLE.—The case of *Bostwick v. Lewis* does not

go so far as to decide that a fraudulent representation as to title is actionable. Bronson, J., in his dissenting opinion in *Whitney v. Allaire*, 1 Comst. 316, referring to it, says: "In *Bostwick v. Lewis* there was a combination to defraud the purchaser in relation to the quality of the land as well as the title to it; and it may fairly be inferred from the report that the recovery was on the ground of fraud in relation to quality alone. Although evidence was given that the title to a part of the property was out of the vendor, it was admitted for the sole purpose of showing that the residue of the tract was of no value." In the same opinion, he says he never knew a case where an action had been allowed on this ground. The same opinion was given by Field, J., in *Peabody v. Phelps*, 8 Cal. 213, who evidently followed Bronson, J., in his dissenting opinion. But this case was afterward questioned in *Wright v. Carillo*, 22 Cal. 595. But the point has been expressly decided in several cases that a false representation respecting title, the vendee relying on it, is actionable. The cases in New York holding that the action will lie are: *Wardell v. Foadick*, 13 Johns. 325, holding that an action on the case for a deceit will lie for fraudulently selling land which has no real existence, notwithstanding any covenants in the deed; *Culver v. Avery*, 7 Wend. 380, where an action was sustained against a loan commissioner for fraudulently representing land he sold free of incumbrances, and that a good title would be given. So it was held in *Monell v. Colden*, 13 Johns. 395, that a false representation as to a certain water privilege attached to land was actionable. In *Clark v. Baird*, 9 N. Y. 183, it was held the action would lie. Johnson, J., says: "I see no other ground upon which this part of the charge could be reasonably objected to except upon the ground that an action will not lie against the vendor of real estate for a false and fraudulent representation respecting the fact of title. Upon that question, if it is not, technically speaking, determined by the decision of this court in *Whitney v. Allaire*, 1 Comst. 305, I think the opinion of the majority of the court entirely satisfactory." In *Gwinther v. Gerding*, 3 Head, 197, it was expressly held that the action would lie, the court citing as authority the cases in New York, *Monell v. Colden* and *Culver v. Avery*. The same point was decided in *Wade v. Shurman*, 2 Bibb, 583, and in *Hays v. Bonner*, 14 Tex. 629.

FRAUD AS TO QUALITY OR SITUATION.—Where a purchaser is on the ground, or is within easy distance of the land, it is his own mistake or negligence if he relies on the representations of the vendor as to the quality or situation of the land, as if it were represented to be good arable land, good grass land, not mountainous, or that it had some privilege in respect to water or other communication; but where there is no such opportunity given, as where the land lies at a great distance and this examination is not practicable, the vendee may well rely on the representation of the vendor, and if false, have an action for the fraud. *Spalding v. Hedges*, 2 Pa. St. 240; *Journey v. Hunt*, Coxe, 235, 1 Am. Dec. 202; *State v. Gaillard*, 2 Bay, 11, 1 Am. Dec. 628; *Maggart v. Freeman*, 27 Ind. 531. So in *Sanusford v. Handy*, 23 Wend. 260, false representations as to the location of land were held to be actionable if the purchaser had not an opportunity at the time of seeing the land. This was very clearly determined in *Bennett v. Judson*, 21 N. Y. 238. The complaint stated that the defendant for the purpose of effecting a sale to the plaintiff of certain lands in the states of Indiana and Illinois, made false and fraudulent representations in respect to their location, proximity to a river and railroad, their agricultural qualities, etc., and the plaintiff confiding in such representations, bought the

land, paid for it, and incurred expenses in removing his family to the same, and bringing them back after he discovered that the representations were false, and the lands comparatively worthless. The sale, it appeared, was made by the agent of the defendant, and the defense was made that the principal had no personal knowledge as to the land. It was held that the action would lie, and the doctrine was affirmed that one who, without knowledge of its truth or falsity, makes a material representation, is guilty of fraud as much as if he knew it to be untrue. The same doctrine has lately been held in New York, in *Indianapolis and C. R. R. Co. v. Tynq*, 63 N. Y. 653. Under what circumstances an action can be maintained for false representations as to the value or situation of real estate, is well stated in *Parker v. Moulton*, 114 Mass. 99; S. C. 19 Am. Rep. 315. There it is held that false representations as to the condition, situation or value of real estate knowingly made by the vendor to the purchaser, are not actionable unless the purchaser has been fraudulently induced to forbear inquiry as to their truth; and in such case the means by which he has been thus induced to forbear inquiry must be specifically set forth in the declaration.

FRAUD AS TO VALUE.—The general principle has been stated that it is not considered fraudulent for a vendor to make a false affirmation as to the value or cost of his property. This may naturally be expected in a vendor, and consequently both parties deal with each other at arm's length. So it is laid down in 2 Bac. Abr. 594, that "if A. possessed of a term for years offers to sell it to B., and says that a stranger would have given him twenty pounds for this term by which means B. buys it, though in truth A. was never offered twenty pounds, no action on the case lies, though B. is thereby deceived in the value." This doctrine is applied in *Holbrook v. Connor*, 60 Me. 578, where it is held that fraudulent misrepresentation of a vendor of real estate as to the price which he paid therefor, are not actionable. And in *Banta v. Palmer*, 47 Ill. 99, a vendor asserted he paid eighty-five dollars an acre, when it was in fact but seventy-five dollars, and in consequence the vendee was induced to pay eighty-five dollars an acre for the land, it was held no action would lie as for a fraud, and the doctrine of this case has been affirmed in a late case in Illinois, *Tuck v. Downing*, 76 Ill. 71. To the same point are *Manning v. Albee*, 11 Allen, 522; *Hemmer v. Cooper*, 8 Id. 334. But it is held otherwise in *Van Epps v. Harrison*, 5 Hill, 63, where the vendor stated he gave thirty-two thousand dollars for property, while in fact he only gave sixteen thousand dollars.

The doctrine, however, is held that where a third party, to induce another to purchase, makes the false assertion as to its cost, he having no interest in the property, it is fraudulent, and an action will be sustained against him for such fraud. This was so held in *Medbury v. Watson*, 6 Met. 246. The court distinguished the case from that of the false representations of a vendor by saying that in the one the vendee was aware of his position, that he was dealing with one whose interest it was to enhance the price, while in the other, the person who makes the false assertions has apparently no object to gain nor motive to deceive, and thereby more readily imposes on the purchaser. In *Cronk v. Cole*, 10 Ind. 485, it was held that a vendee had no right to rely on the representations of another as to the market value of the property sold, as such knowledge is presumably equally within the reach of both.

FRAUD AS TO QUANTITY.—The quantity of land conveyed being often a matter of opinion, a vendor will not, therefore, be held liable for a fraud when he misrepresents the land as containing a certain number of acres.

In *Gordon v. Parmelee*, 2 Allen, 212, in an action on a note for the price of land, false representations by the plaintiff as to the quality and productiveness of the soil, and the number of acres contained within the boundaries, were set up as a defense. It was held that these afforded no defense, as the former were largely matter of opinion and came within the maxim of the civil law *simplex commendatio non obligat*, while as to the latter the defendants had the means of ascertaining the precise quantity of land contained within the boundaries. To the same point are: *Saunders v. Hatterman*, 2 Ired. L. 32; *Lytle v. Bird*, 3 Jones L. 222; *Credle v. Swindell*, 63 N. C. 305; *Pringle v. Samuel*, 1 Litt. 43; *Mooney v. Miller*, 102 Mass. 217. A very excellent general principle applicable to this and other cases is expressed by Field, J., in *Slaughter v. Gerson*, 13 Wall. 379. It is that where the means of knowledge are at hand and are equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of those means and opportunities, he will not be heard to say that he was deceived by the vendor's misrepresentations. But the general rule above stated in regard to a representation as to quantity will not apply where a vendor states as a positive fact of his own knowledge, that the land conveyed contains a given quantity. Here the purchaser has a right to rely on his statement, and if so relying he is damaged, he can proceed against the vendor in an action for fraud. This point was expressly determined in *Cabot v. Christie*, 42 Vt. 121, S. C. 1 Am. Rep. 313, where it is held that where a vendor of land, with intent to induce the sale, makes representations as to the quantity, as of his own knowledge, and the vendee is thereby induced to purchase, the vendor is liable for any damage which the vendee may sustain by reason of a deficiency in the quantity as represented, and although such representations are believed to be true by the vendor when made. In *Hill v. Brower*, 76 N. C. 124, it is held that where the quantity of land is the inducement to the purchase, and there is fraud on the part of the vendor, the transaction is vitiated, and the purchaser may proceed to set aside the sale.

FRAUD AS TO INCOME OR PROFITS.—The rental, income, profits, or produce of land, being within the knowledge of the vendor, a representation respecting which will be considered as the statement of a fact known to him, and if false will make him liable in an action of fraud. In *Dimmock v. Hallett*, L. R. 2 Ch. App. 21, a misrepresentation regarding the rental value of a farm entitled the purchaser to be discharged from his contract. In *Bowring v. Stevens*, 2 C. & P., on the sale of the lease of a public house, the seller falsely represented that his returns averaged a certain amount per month; and it was held that an action lay for the deceit. Similar decisions were made in *Hutchinson v. Morley*, 7 Scott, 341; *Irving v. Thomas*, 18 Me. 418. So a false representation as to the quantity of hay cut from a farm is actionable: *Coon v. Atwell*, 46 N. H. 510; *Martin v. Jordan*, 60 Me. 531; but a false representation as to the quantity of wood or hay that could be taken from a farm, being somewhat a matter of opinion or probability, is not actionable: *Mooney v. Miller*, 102 Mass. 217; *Longshore v. Jack*, 30 Iowa, 298.

GRIGGS v. DODGE.

[2 DAY, 28.]

REMAINDER OVER OF PERSONAL PROPERTY.—Personal property may be limited over by way of a remainder in a will.

REMAINDER CREATED BY WILL.—A testator devised one-third part of his estate, consisting mostly of personal property, to his wife for her use and benefit so long as she should remain his widow, and then devised the whole of his estate to his children. It was held that this was sufficient to create a remainder over.

ACCOUNTING TO REMAINDER-MAN.—After the termination of the particular estate by the marriage of the widow, an account will lie to recover the property limited over.

ACTION of account, demanding “That to the plaintiff the defendants render their reasonable account during the time that they, or either of them, jointly or severally, have been the plaintiff’s bailiffs and receivers.” The declaration stated that the plaintiff, Dodge, was the son, and the defendant, Sarah, the wife of Nehemiah Dodge. On the twenty-first day of April, 1795, Nehemiah made his will, and therein gave to Sarah the use of the one-third part of his whole estate, real and personal, to be received by her after his decease, to enjoy the same so long as she should remain his widow. He also gave to the plaintiff one-eighth part and two-thirds of another eighth part of the whole of his estate. By sundry other devises and bequests he disposed of the whole of his estate, and appointed the plaintiff and Sarah his executors. In the month of April, 1796, he died, possessed of considerable real estate, and also of personal estate to the amount of one thousand five hundred and eight-five pounds six shillings and eightpence, lawful money. The executors qualified and proved the will. That Sarah then and there accepted the provisions in her behalf made by the testator in his will, in lieu of all legal claims that she might have upon his estate; and his estate was actually settled by the executors, according to his directions contained in his will. The declaration further stated that Sarah, while the widow of the testator, at divers times between his decease and the first day of January, 1800, was the bailiff and receiver of the plaintiff of one-third part of the personal estate of the testator, consisting of various articles and securities described in the declaration, amounting to the sum of four hundred and seventy-eight pounds sixteen shillings and threepence, lawful money; and received the same to have the use thereof, until she should cease to be his widow, and then to account to the plaintiff for

one-eighth and two-thirds of another eighth part thereof, amounting to the sum of ninety-nine pounds fifteen shillings and one farthing, lawful money, when she should be afterward thereto requested. The plaintiff then averred, that on the thirty-first day of December, 1799, Sarah intermarried with the defendant, Griggs, and now is his lawful wife; that the whole of the property came into his hands, and that they, thereby, became jointly accountable to the plaintiff for his proportion.

There was a plea in bar reciting the will, which so far as bears upon this case is as follows: "As touching such worldly estate as it hath pleased God to bless me with in this life, I give and dispose of the same in the following manner, viz: First, I give and bequeath unto my beloved wife, Sarah Dodge, one-third of the whole of my estate, for her use and benefit, so long as she remains my widow; Item: I give to my son, Cyrel Dodge, one-eighth part and two-thirds of another eighth part of my estate; Item: I give to my son, Ezra Dodge, one-eighth part and one-third of another eighth part of my estate; Item: I give to my son, Nehemiah Dodge, one-eighth part of my estate; Item: I give to my son, John Dodge, one-eighth part of my estate; Item: I give to my son, Erastus Dodge, one-eighth part of my estate; Item: I give to my son, Abel Palmer Dodge, one-eighth part of my estate; Item: I give to my daughter, Eunice Lyon, one-half of one-eighth part of my estate, excepting twenty-five pounds; Item: I give my daughter, Deborah Dodge, one-half of one-eighth part of my estate, with an addition of twenty-five pounds, which is to be deducted from my daughter, Lyon's, above mentioned; and I do hereby constitute my son, Cyrel Dodge, and my beloved wife, Sarah Dodge, my sole executors." The plea then averred: "That in and by force of said will, the one-third part of the movable estate of said Nehemiah, of which he died seised, did, at the time of his death, vest in Sarah, in her own right, and she had good right by law to have and hold the same to herself, being not accountable to any one therefor; and as such the distributors of said estate did set the several articles which are mentioned in the plaintiff's declaration, being one-third of said Nehemiah's personal estate, and no more, to her, in her own right in fee, according to the terms of the will; and she did dispose of the same while she was sole and widow of said Nehemiah, for her use and benefit, as she had good right by law to do."

The plaintiffs replied that Sarah, while sole, sold the articles of personal estate and collected the securities for the purpose

of changing the nature of the property; that a small part of the same, much less than the interest of the securities, was actually expended by her, while she was the widow of the testator, for her support; but the whole of the avails of the property, upon the intermarriage, came into the hands of Griggs.

A demurrer to this replication was overruled, and it was adjudged by the superior court that the defendants do account.

The general error was assigned.

Dwight and William Perkins, for the plaintiffs in error, said that there were three questions in this case, each of which must be determined against the plaintiffs in error, or the judgment of the court below reversed: 1. Can there be, in this state, a remainder over of personal property? If so, 2. Are the terms of the will, in this case, sufficient to create such a remainder? If so, 3. Can the action which has been brought, under the circumstances of this case, be maintained?

1. In England, at common law, such limitation was void: 2 *Fearne on Con. Rem. and Exec. Dev.* 26; *Hargrave's Co. Litt.*, vol. 3, p. 20 a, note 120, Lond. 8vo ed. A gift of a personal chattel, to use and improve generally, or for an uncertain time remainder over to a third person, was considered absolute: 1 *Dyer*, 7; *Brooke*, 15; *Bigge v. Bensley*, 1 Br. Ch. Ca. 183. And *Matthew Manning's case*, 3 Co. 187, and *Child v. Baytie*, 1 Cro. Jac. 461, did not establish the opposite doctrine. The principle seems to be settled that whenever the words made use of in the will limiting an estate would, by the construction put on the statute of Westminster the second, amount to entailment, the gift should be absolute in the first donee: 2 *Fearne Cont. Rem. & Exec. Dev.* 143, 154, 233, 236, 239. And *Porter v. Bradley*, 3 T. R. 143, destroyed all difference between freehold estates and chattel interests. Thus the common law of England, independent of the statute of Westminster the second, is nearly the same with regard to the limitation of real and of personal estate. But this view, counsel argued, produced a suspicion that the principle above stated was not only unsettled, but in itself unsound.

Counsel further argued that, although this state had adopted the common law of England with respect to limitations in tail, *Willis v. Olcott*, Kirby, 118, yet the statute, 24 Edit. 1796, must have reference to real estate only. That even in England, if personal estate is limited in such a way as to create a contingent remainder, the first grantee may sell it, previous to the

happening of the contingency and wholly defeat the remainderman of his interest: 2 Bl. Com. 263; Godb. 42. That there was no difference between an executory devise and a contingent remainder, the former being "only an indulgence to a man's will:" 2 Fearne Cont. Rem. & Exec. Dev. 2. The case of *Hyde v. Parratt*, 1 P. Wms. 6, held a devise of chattels to the testator's wife for life, remainder to his son, good, merely the better to comply with the testator's intention. So also *Upwell v. Halsey*, Id. 651.

2. No instance of a limitation over of personal property can be found, where such limitation is not expressly stated in the will. *Manning's case* proceeded upon this principle, and *Hyde v. Parratt* and *Upwell v. Halsey* were cases of express limitation. Fearne describes an executory devise to be, where personal estate is devised to one for life, and afterward is given over to somebody else. And the courts have been extremely cautious, lest the doctrine should be extended: 1 Dyer, 7; Id. 74; *Everest v. Gell*, 1 Ves. Jr. 286; *Rawlins v. Goldfrap*, 5 Id. 440; *Butterfield v. Butterfield*, 1 Ves. 133-154; *Beauclerc v. Dormer*, 2 Atk. 308; *Seale v. Seale*, Prec. in Chan. 421; Chan. Dig. 266. The court will in no case presume a limitation. The case of *Smith v. Gates*, 2 Root, 532 (1 Am. Dec. 89), was cited as being directly in point.

3. The action of account in this case is not authorized by common law or statute: 2 Fearne, 28. The action is brought against the husband and wife jointly and severally; they never were accountable severally. All the heirs should have been made parties to the action. The mode of distribution adopted here, viz: by auditor, is not authorized by statute, which prescribes but two modes: by distributors appointed by the court of probate, by agreement under the hands and seals of the parties; and lastly, there is no privity between the plaintiff and defendants.

Goddard, for the defendant in error, urged that it was well settled that a remainder in personal property may be created either by deed or by will: 2 Bl. Com. 398; 1 P. Wms. 290; and that there may be such a remainder, although no remainderman is definitely pointed out: *Harding v. Glyn*, 1 Atk. 469; *Davers et al. v. Davers et al.*, 3 P. Wms. 40; *Tissen v. Tissen*, 1 P. Wms. 503; *Lucas v. Evans*, 3 Atk. 260; *Billings v. Sandom*, 1 Br. Ch. Ca. 394; *Upwell v. Halsey*, 1 P. Wms. 651; *Flanders v. Clark*, 1 Ves. 9; *Duke of Marlborough v. Godolphin*, 2 Id. 61. He insisted that the case of *Smith v. Gates* did not support the

reasoning advanced by the opposing counsel, but rather favored the principles contended for by the defendant in error. That the argument drawn from public policy was overthrown by the case of *Shepard v. Lessingham*: Amb. 122 and the statute of this state; Stat. 23, edit. 1795. It was further contended, in support of this form of action, that the children of the testator were the remainder-men, as appeared from the will, and that the plaintiff was, as remainder-man, entitled to his portion as therein expressed; that in England, almost all questions of this kind were settled in chancery, and a bill for an account always exhibited: *Lucas v. Evans*, 3 Atk. 260; *Upwell v. Halsey*, 1 P. Wms. 651; and that although the jurisdiction of courts of chancery has been limited in this state, yet immemorial practice sanctioned the action of account in this instance as being the fairest action for the plaintiff. As to the objection that the husband and wife were sued jointly and severally, it could only be taken advantage of on demurrer; it is now too late. The same answer may be given to the objection that all the legatees were joined in the suit. As to the want of privity, it was replied that the tenant for life of personal property has always been deemed a trustee for the remainder-man: 1 Ch. Rep. 110; and privity in estate is one of the inseparable incidents of a trust: 2 Com. Dig. 354. Bills to account were always brought in England against a trustee.

By Court, TREADWELL, Lt. Gov., NEWBERRY, AUSTIN, ALLEN and EDMOND, Assts., dissenting. The judgment affirmed.

The same point came before the court in the subsequent case of *Taber v. Packwood*, 2 Day, 52, when the principle was affirmed that personal property may be limited over by way of remainder in a will; and it was further held that after the death of the legatee for life, the remainder-man may recover the property limited over, in an action on the case; and in such action it is sufficient to describe the property as consisting of money and other articles of personal estate of the value of a specified sum.

See *Smith v. Gates*, and note, 1 Am. Dec. 89, showing the construction placed on the latter case.

FRANKLIN v. GORHAM.

[2 DAY, 142.]

REDEMPTION OF MORTGAGED PREMISES.—A mortgagor, to secure a debt due the mortgagee, mortgaged to him two pieces of land by separate deeds; a creditor of the mortgagor levied an execution on the latter's right in one of the pieces; it was held that the creditor was entitled to redeem both, by paying the whole mortgage debt; but could not re-

deem the piece set off to him on execution, by paying such proportion of the whole debt as that piece bore in value to the whole mortgaged premises.

PETITION in chancery to redeem mortgaged premises. The following facts were stated in the petition and found by the court: Nathaniel Scribner, seised in fee of two tracts of land, one lying in Norwalk, the other in Fairfield, mortgaged them to Jerusha Graham, January 4, 1797, by distinct deeds, each conditioned for the payment of the whole mortgage money. On the twenty-third of October, 1797, the petitioners (Gorham and others) attached all the right of the mortgagor in the Fairfield estate. On the seventeenth of December, following, the respondents, as creditors of Scribner, attached the property in Norwalk, and on the twenty-sixth of that month, having notice of the petitioner's attachment, obtained from the mortgagee an assignment of her claims on the mortgagor, and a release to them of her title in all the mortgaged premises. The two estates attached were eventually set off, on execution, to the parties, and appraised as subject to such proportion of the debt as they respectively bore to the whole mortgaged premises.

The superior court decreed a redemption of the Fairfield estate only, on payment of such proportion of the whole mortgaged debt as that estate bore in value, at the time of the decree, to the whole mortgaged premises.

Daggett and R. M. Sherman, for the plaintiffs in error (the respondents below), contended that they stood in the same place, and were vested with all of the rights of the mortgagee; that the title suffered no change by assignment, and that it was the nature of every mortgage contract that each part of the premises should be pledged for the whole debt. To apportion was to violate the contract, and great injustice might result from such an apportionment. The English cases do not allow it. *Ex parte Carter*, Amb. 733; 2 Fonb. Eq. 312; 2 Vent. 339. They further contended, that becoming vested with the legal estate of the mortgagee, the respondents have a right to the whole, until the petitioners pay the mortgage money. That to suffer the petitioners to redeem by paying prior execution upon the mortgaged premises would be contrary to the principles of *Punderson v. Brown*, 1 Day, 93 (*ante*, 53). That the petitioners and respondents were in equal equity, and the latter, having the absolute estate at law by assignment, were entitled to hold the whole till all their claims on the estate, not posterior to those of the petitioners, had been satisfied. *Marsh v. Lee*, 2 Vent. 337; *Bovey v. Ship-*

wick, 1 Chan. Ca. 201; *Wyndham v. Richardson*, 2 Chan. Ca. 212; *Edmunds v. Povey*, 1 Vern. 187; *Sadler v. Bush*, 2 Id. 30; *Holt v. Mill*, 2 Id. 279; Pow. Mort. 511, *et seq.*

Edwards and Smith, for the defendants in error.

By COURT. The respective estates in Norwalk and Fairfield, though comprised in two separate deeds, form but one entire pledge for the security of the debt due to Mrs. Graham; on the payment of which, according to the terms of the condition in each deed, both would have been released on failure, both were still subject to an equity of redemption in the mortgagor. An equity of redemption is indivisible; and though liable to be attached and set-off in satisfaction of a debt, as the property of the mortgagor, cannot be apportioned among creditors. As subsequent mortgagees have a lien on the estate, and so a right to remove all former incumbrances by redemption, the same principle is applicable to attaching creditors. The first acquires a right to redeem the whole estate out of the hands of the mortgagee, by paying the mortgage money, and thus to place himself in his situation; with this difference only, that to the mortgage debt he has added his own; he having acquired a defeasible estate, a lien on the property, removable by the next attaching creditor, who has acquired the same right diminished only in value. This process may be pursued until the estate is exhausted.

The foregoing principle being adopted, a rule is furnished by which the respective rights among attaching creditors can be correctly and distinctly ascertained and settled. The respondents, having purchased in the legal estate of Mrs. Graham, did not vary their condition as creditors. The idea is unfounded, that this transaction added any legal or equitable force to their claims, or varied their relative situation with the other attaching creditors. By this purchase, they took the estate of the mortgagee, subject to the same equity as before, redeemable either by the mortgagor or his creditors. Assuming the principle that the whole property comprised in both mortgage deeds forms but one mortgage, pledged for one and the same debt; that an equity of redemption is not devisable, and not to be apportioned among creditors; and that the first attaching creditor places a lien on the estate and acquires a right to redeem the whole; then, in this case, the petitioners were entitled to a conveyance of all the right which the respondents had derived by their deed from Mrs. Graham, the mortgagee, on paying to the respondents all

that remainder due of the original mortgage, including principle and interest, together with a small sum expended by the respondents for taxes.

Judgment reversed.

This case is cited and explained in *Allyn v. Burbank*, 9 Conn. 152. Daggett, J., referring to it, says: "By adverting to that case it will be seen that the only principle decided by the court, was that a mortgagor, or one standing in his place by levy of an execution, could not redeem a part of the mortgaged property by paying a part of the money due on the mortgage, but must pay the whole. This is a very clear principle, applicable to the subject, and was, doubtless, correctly applied."

TUTTLE v. RUSSELL.

[2 DAY, 201.]

IMPEACHMENT OF WITNESS.—A witness may be impeached by showing that at the time the facts sworn to occurred he was intoxicated. But the intoxication must be proved by direct evidence, or by the acts and conduct of the witness, and not by the quantity of spirituous liquor he had previously drank.

ACTION of slander. Upon the trial, the plaintiff, in order to prove that he was present at a certain place and saw a certain affray, introduced witnesses who swore that such was the fact. To repel this testimony, the defendant called one James Terrel, who swore that he was present at the time and place referred to, and that he did not see plaintiff there; that plaintiff was not there and did not see the affray. To discredit the witness, Terrel, the plaintiff then offered to prove that said witness was so intoxicated that he did not know whether the plaintiff was there or not; and to show this the plaintiff offered evidence of the quantity of spirituous liquors Terrel had drank in the fore part of the day and immediately before he went to the place specified. The defendant objected to this evidence, and the court ruled it out, allowing the plaintiff, however, to prove that Terrel was intoxicated, by direct testimony, or by any acts or conduct of his evincing a state of intoxication. A verdict being found for the defendant, the plaintiff filed his bill of exceptions.

Edwards and Staples, for the plaintiff in error, contended that the evidence offered and rejected was relevant; that the jury should know the condition of the witness at the time the facts occurred, in order to judge of the weight to be given to his testimony; that it was highly probable that the consequence of

drinking a quart of rum would be intoxication; and courts and juries are to deal with probabilities, not possibilities; it being barely possible that intoxication would not follow under such circumstances. They argued further, that to ask witnesses directly whether such a person was drunk, as suggested by the court below, would be seeking an opinion, not a declaration of the fact, which must be proved by the actions of the persons, the quality and quantity of the liquor drank; that mere actions themselves were not conclusive as to drunkenness, it is necessary to ascertain the cause; and such cause is proper evidence for the jury.

If it be admitted that a man when drunk is less capable of observing and remembering facts than when sober, and if the jury might, from seeing a man drink a quart of rum, and seeing him soon after act strangely, infer that he was drunk; then the liquor drank, quantity and quality of it, together with the actions of the person, ought to have been proved before the court and jury; because the jury might, from these circumstances, have inferred legally that the man was drunk.

Daggett and Baldwin, for the defendant, stated: The only objection taken to the judgment of the superior court, in this case is, that the plaintiff was not permitted to prove the quantity of liquor drank by a certain witness, who testified for the defendant. It was admitted, by the superior court, that the testimony would be proper to show that the witness, at the time the facts occurred, about which he testified, was intoxicated, and therefore not a competent judge. The plaintiff was not content with this rule, but insisted that he ought to be permitted to show the quantity of ardent spirits which the witness had drank. We contend that such testimony was improper, and therefore legally rejected. It tends to endless inquiries, such as the strength of the spirits, the capacity of the witness to bear any great quantity, his bodily health, and the accuracy of his mind when more or less intoxicated. It is also uncertain testimony, as it cannot be inferred that any quantity of spirits would operate for any given time.

It is, also, a new objection, unknown to our law books. The grounds assumed might do much mischief, and the end proposed is neither safe nor useful.

By Court. Judgment unanimously affirmed.

See 1 Wharton on Evidence, sec. 401, where this case is cited as authority.

GARDNER v. PRESTON.

[2 DAY, 205.]

EVIDENCE IN CONSPIRACY TO DEFRAUD.—In an action against A., B. and C. for a conspiracy to defraud such merchants and traders as they might be able to impose on by representing A., who was insolvent, as a man of large property and safely to be trusted, evidence that the defendants made such representations to other persons than the plaintiff, in consequence of which such persons, without the request of the defendants, recommended A. to the plaintiff, whereby the plaintiff was induced to give him credit, is admissible.

ACTION on the case, founded on a fraudulent combination. The declaration stated that on the twentieth of March, 1803, the defendants, then residing in this state, combined and conspired to defraud such merchants in Boston as they might be able to deceive. That plaintiff was at that time a Boston merchant. The scheme the defendants agreed upon was that two of their number, Talman and Bacon, should proceed to Boston, where Talman should represent that he was desirous of purchasing a great quantity of goods, that he was a man of large property, and safely to be trusted, and that he expected that Judge Preston, one of the defendants, would shortly arrive with a large sum of money for him. That accordingly, Talman and Bacon went to Boston and made these representations to several merchants, and among others to Peabody & Rogers. Preston and Cunningham, another defendant, followed soon afterward, and delivered to Talman two thousand dollars, for the purpose of making it believed that he was possessed of a great amount of property, and to enable him to purchase a large quantity of goods, by making payment in part, and for the residue to obtain credit. That Bacon, who was known in Boston to be a man of property, went with Talman to the stores, and assisted in selecting goods. The declaration then averred, that “the defendants, with the same fraudulent intent, did there, at said Boston, jointly and each of them, to the said Peabody & Rogers, and to very many of the other good people of said Boston, so that it might there be generally heard and believed, and to the plaintiff give out, declare and represent that the said Talman was a man of large property, of fair character, and safely to be trusted, and did so declare and represent to the said Peabody & Rogers particularly to induce them to recommend him, the said Talman, to such merchants in said Boston, as might have, and be induced to sell, on the terms aforesaid, such goods as the said Talman might

choose to purchase. And the said Peabody & Rogers, confiding in such representations, did accordingly, and at the instance of the defendants, represent and recommend the said Talman to the plaintiff, as a man of large property, fair character, and safely to be trusted." That plaintiff thereupon sold Talman goods to a considerable amount, for part of which Talman paid in cash, and gave his note for the residue which had never been paid. That Talman was, from the beginning, a bankrupt, a swindler, and a common cheat.

The defendants pleaded severally, not guilty. On the trial, the plaintiff offered several depositions to prove that the defendants "did in pursuance of said conspiracy and combination, and for the purposes recited in the declaration, recommend said Talman to said Peabody & Rogers, and to others in said Boston, as a man of large property and safely to be trusted, and with intent that said Peabody & Rogers should recommend him to the plaintiff as a man of large property, and safely to be trusted;" and that "said Peabody & Rogers were induced, from the recommendations of said Preston and Bacon, to recommend said Talman to the plaintiff, as alleged in the declaration, and did, in fact, so recommend said Talman to them, to be one of the first merchants in Connecticut, and safely to be trusted." To the admission of this evidence the defendants objected, unless the plaintiff could prove, that Preston and Bacon requested Peabody & Rogers to recommend Talman to the plaintiff. The plaintiff insisted that his depositions ought to be admitted, on the ground: 1. That it was pertinent to the issue joined in the case, and proved the facts alleged in the declaration; 2. As evidence to the jury of the conspiracy and combination charged in the declaration; 3. As evidence to the jury that Preston and Bacon intended that Peabody & Rogers should recommend Talman to the plaintiff as a man of property.

The court rejected the evidence on the ground taken by the defendants. A verdict was found against Talman, but in favor of the rest of the defendants; and the plaintiff filed his bill of exceptions.

Smith and Bristol, for the plaintiff, contended that the evidence was admissible, for the reasons urged at the time of the trial.

Daggett and Smith (of Woodbury), for the defendant.

By Court. The general question is, whether the testimony offered was admissible, to prove the combination and fraud, for the redress of which the plaintiff instituted his action. It is

for the court to decide whether the evidence conduced at all to the proof of the fact which was to be ascertained. But this point having been determined, the question how far it conduced to prove the fact, is exclusively within the cognizance of the jury. *Gibson v. Hunter*, 2 H. Bl. 205. Direct evidence, for the most part, is neither to be required nor expected; and this remark is of peculiar importance, in reference to the proof of fraud. "The nature of the thing itself, which is generally carried on in a secret and clandestine manner, does not admit of (positive) evidence; and, therefore, if no proof but that of actual fraud were allowed in such cases, much mischief and villainy would ensue, and pass with impunity. Circumstantial evidence is all that can be expected, and, indeed, all that is necessary to substantiate such a charge." *Park on Insurance*, 214. Nor is it requisite, that the circumstantial evidence should have a direct relation to the immediate subject of inquiry; much less, that the inference drawn from the circumstances proved should be absolutely certain or necessary. It is sufficient, if the evidence be such as to produce a fair and reasonable presumption of the facts in issue; and if it has that tendency, it ought to be received, and left to the consideration of the jury, to whom alone it belongs to determine upon the precise force and effect of the circumstances proved. Upon this principle, evidence of irregular and suspicious transactions and circumstances, relating to bills drawn payable to fictitious payees, has been admitted, though none of those transactions and circumstances had any apparent relation to the bill then in question. *Gibson v. Hunter*, 2 H. Bl. 288.

A prominent fact, averred by the plaintiff, was the combination of the defendants to defraud; and in proof of this, the testimony, which the court below rejected, was principally offered. In the case of *King v. Parsons et al.* 1 W. Bl. 392, which was an information for a conspiracy, it was adjudged "that there was no occasion to prove the actual fact of conspiracy, but that it might be collected from collateral circumstances." A combination or conspiracy may be proved by evincing a concurrent knowledge and approbation in the persons conspiring of each others acts; and it is most usually done by proof of the separate acts of several persons concentrating in the same purpose or particular object. The greater the secrecy that is observed relative to the object of such concurrence, and the more apparent the similarity of the means employed to effect it, the stronger is the evidence of conspiracy.

1 East's P. C. 97. In the case of *King v. William Stone*, 6 T. R. 527, it was said by Lawrence, J., "that in *Tooke's case* he had alluded to the cases of *Lord Stafford* and *Lord Lovatt* to show, that in order to prove a conspiracy, the acts of the different conspirators were admissible, though acts to which the prisoners were no party. In *Beal v. Thatcher*, 3 Esp. 194, a very recent case, the principle just mentioned is recognized and applied. The plaintiff brought an action on the case against the defendant, for his having given a false character of one Johnston, as to his solvency, by reason of which the plaintiff had trusted him with goods, which had not been paid for. The plaintiff's counsel called a witness to prove that the defendant had recommended Johnston to him, the witness, and represented him as a man entitled to credit, and in good circumstances. This evidence was objected to as being *res inter alios acta*. It was said the issue was not whether he had defrauded the witness, but the plaintiff. Lord Kenyon, however, declared it to be admissible, because "it proved a subsisting fraudulent connection between the defendant and Johnston, and might therefore go to the jury."

The testimony offered by the plaintiff below was clearly admissible within the scope of the principles before mentioned. The recommendation by the defendants of Talman, a bankrupt of ruined reputation, to several merchants in Boston, as a man of large property and safely to be trusted; their concurrence in the same representations, at the same time, and apparently for the same purpose, conduced to evince the combination alleged. It is unnecessary to say that the circumstances of themselves were plenary proof, for, if they were of any weight in the scale of justice, they should have been committed to the jury for their consideration. Whether the recommendation of Peabody & Rogers to the plaintiff was admissible evidence must have depended on the previous proof of combination among the defendants. For the connection between the parties having once been established, then, whatever was done, in pursuance of the conspiracy, by one of the conspirators, is to be considered as the act of all. This principle has been established by repeated determinations, and must be considered as at rest: 1 East's P. C. 97; 2 McNally, 611.

We are, therefore, of opinion that the testimony offered was admissible, and that the judgment of the superior court be reversed.

EDMONDS, Asst., dissenting.

This case is cited and approved in *Thompson v. Rose*, 16 Conn. 71, and in *Luckey v. Roberts*, 25 Conn. 492; the court in the latter saying: "So long as the conduct of men is allowed to throw light upon their motives of action, so long such evidence is most proper to go to the jury when those motives are the subject of inquiry. This principle was fully recognized in *Thompson v. Rose*, and in *Gardner v. Preston*, 2 Day, 205, and it is the uniform doctrine of the courts."

NICHOLS v. BLAKESLEE.

[2 DAY, 218.]

PLEADING TENDER OF DEED.—Where the plaintiff was bound to give a warranty deed to the defendant, as a condition precedent, it is sufficient to allege in the declaration that he made out and tendered a warranty deed in every way legally authenticated, with a profert, without setting out the deed at length.

ALLEGATION AS TO REASONABLE TIME.—Where an act, which the plaintiff was bound to perform within a reasonable time, is alleged to have been done within a reasonable time, to wit: on or about such a day, it is sufficient after verdict.

ACTION of debt to recover a sum stipulated in a written submission to arbitration, to be paid as a penalty for non-performance of the award. The submission was of a controversy respecting the title to a piece of land, and contained an agreement between the parties that if the arbitrators should find the title to be in Blakeslee, they should appraise the land; Blakeslee should, within a reasonable time, execute a deed of it to Nichols, and Nichols should, thereupon, give his note for the amount of the appraisal, on penalty of fifty dollars, to be paid by Blakeslee in case of his failure to execute such deed within a reasonable time, and by Nichols in case of his failure to give such note on Blakeslee's executing the deed. The arbitrators awarded in favor of Blakeslee, and appraised the land. The declaration then averred that Blakeslee (the plaintiff in the lower court), "within a reasonable time, to wit: on or about the first day of October, 1799, made out and executed a good warranty deed of said land, every way legally authenticated" (of which a profert was made), that he tendered it to Nichols and demanded his note; but that Nichols refused to receive it or to give his note, or do anything under the submission.

The defendant, in his plea, denied the tender of the deed; on which issue was joined, and a verdict found for the plaintiff. The defendant then moved in arrest, on account of the insufficiency of the declaration; which motion was overruled, and

judgment rendered for the plaintiff. Upon a writ of error to the superior court, the judgment of the county court was affirmed.

Edwards and Staples, for the plaintiff in error, contended: 1. The deed, which the defendant in error alleges he made and tendered, ought to have been recited in the declaration. The averment relative to it that it was a good warranty deed, in every way well executed, and the profert of it, are insufficient. The English rule on this subject is well settled. It is that wherever a party is under a covenant to execute and deliver any known legal instrument, he must, in his declaration after averring a performance, set forth the instrument in *hisce verbis*; that the court may see whether the instrument executed and tendered comports with the covenant; for such question is one of law to be decided by the court: 3 Salk. 498; Gilbert's Eq. Rep. 253; Cro. Jac. 165, 363; 1 Leon. 71, 72; 6 Vin. Ab. 467.

The objection that there are two modes of declaring on written contracts, one according to their legal effect, the other by setting out the instrument at large, does not apply. This is a case of setting forth a covenant, and the instrument containing the covenant is the instrument declared upon; to show that the covenant has been fulfilled, it is necessary to place the instrument containing the covenant upon the records. It has been said that all the allegations relative to the deed are mere surplusage, and may be rejected, as the defendant refused to abide by the award, and *Jones v. Barkley*, Doug. 684, is cited, but in that case the defendant's plea was held not good, as it was his own act that caused the plaintiff not to execute the release. The terms of this contract expressly negatives the supposition offered by the opposing counsel that the covenants were mutual, and Blakeslee might recover of Nichols without making or tendering any deed.

2. They argued further that the time of performance was material, and that the allegation of a tender made on or about the first day of October, is insufficient and bad even after verdict.

Smith and Bronson, for the defendant in error: 1. As to the exception that the deed mentioned in the declaration ought to have been set forth at large, it is held to be the better method, when the action is founded directly on a written instrument, to declare upon it according to its substance and legal effect: *Dundass v. Weymouth*, Cowp. 665; *Price v. Fletcher*, Cowp. 727;

Bristow v. Wright, Doug. 665. And every reason will apply with equal force in favor of this mode of declaring in cases where the written instrument is collateral to the principal undertaking. The cases cited in support of the opposite doctrine do not declare the reasons on which they are founded and deserve but little attention. This deed is made parcel of the record; the adverse party is entitled to oyer before pleading; and it cannot be pretended but that Nichols has every advantage to which he would be entitled were the deed set out in *hisce verbis*.

2. As to the exception that the allegation of the time when the deed was executed and tendered is not sufficiently precise, it may be replied that, where the day does not make a part of the contract, the day laid is not material: *Matthews v. Spicer*, 2 Str. 806. Moreover, reasonable time is a matter of fact, depending upon all the circumstances of the case; the question of law cannot arise till all these circumstances appear: 1 T. R. 167. They contended further that Blakeslee was under no obligation to execute or tender any deed whatever, as Nichols had refused to do anything under the award: *Jones v. Barkley*, Doug. 684.

By Court. Judgment unanimously affirmed.

EVERTS v. CHITTENDON.

[2 DAV, 333.]

DEVISE.—FEE WHEN VESTED.—A testator devised the use and improvement of all his real estate to his wife until his son should arrive at the age of twenty-one years, she bringing him up, and then devised to his son the whole of his real estate, except the use and improvement as aforesaid, it was held that a fee vested in the son, subject to a personal trust or confidence in the mother, immediately on the death of the testator.

ACTION of ejectment for three pieces of land. From the record the following facts appear: The plaintiff's father, Joel Everts, deceased, being seised in fee of the demanded premises, made his last will, wherein he bequeathed to his wife, Mary Ann Everts, the whole of his movable estate, she paying his debts and funeral expenses. His real estate he devised as follows: "I likewise give unto my said wife the use and improvement of all my real estate, until my son, Joel Everts (then about five years of age), arrives at twenty-one years of age (then she to have and enjoy the use and improvement of one-third of said

real estate during her natural life), she, my said wife, bringing up my said son until he arrived at twenty-one years of age. Item: I give to my well beloved son, Joel Everts, the whole of my real estate, to be and remain to him an estate forever, excepting the use to be disposed of as above mentioned." In the event of his death before twenty-one years of age, or without heirs of his body, the testator gave to his wife the use of all his real estate during her life; and devised the same afterward to Gilbert Everts, junior, his brother's son. After the testator's decease, his widow entered upon the demanded premises, and having intermarried with the defendant, who has remained in possession ever since she died, Joel Everts, the plaintiff, still a minor, was brought up and supported by his mother until her decease, and by the defendant ever since.

Upon these facts, the superior court determined in favor of the defendant.

Daggett and Allen, for the plaintiff in error, contended that the devise to the wife was of an estate for life upon condition that she brought up the child; that it was a trust that could not be assigned; and that her interest ceased upon her death, although that happened before the plaintiff arrived at the age of twenty-one years. 1 Eq. Ca. Ab. 194, 195, pl. 2, 3, 4; 2 Eq. Ca. Ab. 363, pl. 13; 8 Vin. Ab. 291, pl. 13; Pow. on Dev. 301, 302; Willes, 301; Cro. Eliz. 252; 3 P. Wms. 176; Gilb. Eq. Rep. 36. They further examined and explained, *Boraston's case*, 3 Rep. 19; *Lomax v. Holmeden*, 3 P. Wms. 176; 2 Leon. 221; 3 Id. 78; *Dedicott's case*, Id. 9; *Balder v. Blackburn*, Hobart, 285; *Courthope v. Heyman*, Carter, 25; *Taylor v. Biddall*, 2 Mod. 289; cases upon which the judgment of the superior court was founded, and insisted that not one of them supported that judgment.

Sterling and Gould, for the defendant in error, contended that the whole estate was devised to the wife, who took a beneficial interest for so many years, as the son was under full age at the testator's death; that the word "until" was descriptive of the time when the limitation in favor of the son was to take effect: *Boraston's case*, 3 Co. 19; *Hayward v. Whitby*, 1 Burr. 228; *Taylor v. Biddall*, 2 Wood. 289; *Fearne on Con. Rem.* 167, 171, 438; *Dedicott's case*. That the interest first devised to the plaintiff's mother was not determined by her death; that the distinction between a devise of a power over a subject, and a devise of the thing itself for a limited time, was well settled:

Mod. 774; Dy. 36 b; Cro. Eliz. 674, 734, 252; Dy. 210. To the objection, that as the condition, annexed to the devise to the mother, could not now be performed by her, the term is forfeited; and to the objection that the trust was of so personal a nature that it could not be assigned or transmitted, they cited: *Smith v. Havens*, Cro. Eliz. 252; *Courthope v. Heyman*, Cart. 25, and *Balder v. Blackburn*, Hob. 285. And conditions subsequent rendered impossible by the act of God do not divest the estate: Co. Lit. 206; 2 Bl. Com. 156, 157.

By COURT. The questions raised on this record are, whether a fee, immediately on the testator's death, vested in his son, the plaintiff in error, subject to a personal confidence or trust reposed in the mother, which ceased at her death; or whether the devise to Mary Ann Everts was of a term for years, limited by the period in which her son should attain, or, if he should die before, might have attained, had he lived twenty-one years of age. The former, in our opinion, is the true construction of the will. There is no rule better established than "that the intention of the testator expressed in his will, if consistent with the rules of law, shall prevail." In the expression of the intention, as Lord Hardwicke truly said in *Bagshaw v. Spencer*, 1 Ves. 142; S. C. 2 Atk. 246, 570, 577, there can be no magic of particular force in certain words, more than in others; their operation must arise from the sense they carry; and that sense can only be found by considering the whole will together.

What the intention of the testator was, it is not difficult to discover. For his wife he had made a provision, by a bequest of all his movable estate, and a devise of the one-third of all his real estate, during her natural life. This, according to the general practice of our country, and the law for the distribution of intestates' estates, was, at least, a reasonable disposition of property for the support of his wife; and it is no unfounded presumption that it was so considered by the testator. At the making of the devise, Joel Everts, the testator's only son, was about five years of age. What more reasonable, than that the testator should commit him to the guardianship of his mother, and give to her the improvement of his estate to maintain, protect and educate him? Accordingly, it appears that the testator gave to his wife the use and improvement of all his real estate, until his son should arrive at twenty-one years of age, "she bringing him up." The specific phraseology, "she bringing him up," limits the trust to the wife personally; and an expression more exclusively appropriate to this object

could not have been selected. The manifest intent of the testator collectible from his will, in our judgment, may be thus expressed: The use and improvement of one-third part of my real estate I give to my wife, for her personal benefit, so long as she shall live; and if my son should die without issue of his body, before he attains twenty-one years of age, she shall have the use of all my estate. But if my son shall live, during his minority his mother shall be his guardian; and to enable her to fulfill the duties of this relation, she shall receive, without account, the rents and profits of my estate not above disposed of. Subject to this trust, it is my will that all my property shall vest in my son Joel, and be his forever.

Conformably with this construction, the real estate devised was not a term in Mary Ann Everts, but a mere personal trust or confidence, which ceased at her death. In other words, a fee, immediately on the testator's death, vested in his son, subject to the personal trust or confidence reposed in his mother. The intention of the testator is collectible from the apparent purpose for which the use of his estate, during his son's minority, is given to his mother. It is collectible from the reasonableness of it, the duty of M. A. Everts, and the means of performance, being designedly commensurate. And as the construction given is forced upon the mind by every consideration, arising from the relation of the parties, and supposable views of the testator; and so it is indispensably necessary, to avoid the most obvious absurdity. For who can believe that the testator intended to bequeath his son to an unknown guardian, and to grant to him the improvement of all his estate as a compensation for his services? This, unreasonable as the supposition is, presents but a partial view of the subject. For, on the construction contended for by the defendant, it might happen, that the mother and son having died, for fifteen years or more, the testator's estate should be enjoyed by aliens in blood. In the meantime, his brother's son could take no benefit of it, although he is the declared object of the testator's bounty.

The intention of the testator having been ascertained, there is an end to all further inquiry, as no rule of law will be violated by carrying it into effect. "In the construction of wills, adjudged cases may very properly be argued from, if they establish general rules of construction to find out the intention of the testator:" *Hayward v. Whitby*, 1 Burr. 233. But it is so plain, upon the true intent and meaning of this will, that it is quite unnecessary to cite cases upon it. Of those which, on

the argument, were adduced, some notice, however, shall be taken, as they most strikingly confirm the construction which has been given.

In the second and third volumes of Leonard's Reports there are two anonymous cases, of which the following is a statement: 2 Leon. 221; 3 Leon. 73. A. devised that his land should descend to his son, but that his wife should take the profits until his full age, "for his education and bringing up." The wife married and died. It was resolved that the second husband should not have the profits. "Nothing is devised but a confidence, and the wife is a guardian or bailiff to the infant." The parallel between these cases and the principal one is so obvious as to render all observation superfluous.

The next case cited was that of *Lomax v. Holmeden*, 3 P. Wms. 175. Mr. Lomax, by will, devised all his lands and tenements to a trustee and his heirs, to the use of his wife for life, she paying two hundred pounds per annum to the testator's son, Caleb Lomax, until his age of forty years; and in case the wife should die before that period, then to his daughters and their heirs, they paying the same sum unto Caleb Lomax until his age aforesaid: "The testator hoping that his son Caleb would by that time have lived to see his folly." After which the testator devised the premises to Caleb for life, and from after his death, to the use of his first son, and the heirs male of his body. The testator died; the wife also died. Caleb married, and had a son (the plaintiff), but died before his age of forty years. The bill was brought for an account of the profit of the premises from the death of Caleb, the plaintiff's father; and the question was whether the estate devised to the testator's daughters should subsist, now Caleb was dead, until such time as he should, had he lived, have attained to his age of forty. It was argued by the defendants (the daughters), that the devise created an absolute title and interest in them until their brother should have attained forty years of age, had he lived so long. But the master of the rolls (Sir Joseph Jekyl), after time taken to consider it, and having mentioned and commented on the cases cited, decreed that this estate, devised to the testator's daughters and their heirs, determined on the death of Caleb; and that agreeably to all common sense and reason, the interest devised must cease when it became impossible for him to arrive at the age of forty. For taking it literally that the daughters should enjoy the land until Caleb should attain to his age of forty, this would be to make them hold forever, be-

cause Caleb, having died before that age, could never afterward attain to it. If, however, the estate or interest were created for a particular purpose, as to constitute a fund for payment of debts (which was *Boraston's case*), then, since the sons might die the next day, or soon after the testator, it would be very hard that such an event, occasioned purely by the act of God, should defeat the fund provided on purpose for the benefit of creditors; and, therefore, in aid of the honest intention of the testator who may be supposed to have computed the time wherein the profits of the estate would be sufficient for that end, the judges, by liberal interpretation, have concluded that the deviser meant that the devisee, or executor, should have the land for so long a time as the son, if he had lived, should have arrived at the age mentioned; "but in all cases when no such intention appears, the estate or interest would absolutely determine by the death of the party under the age specified in the will. That such construction seemed the more just in the present case, as the reason appeared why the testator created this interest by his will, until his son should attain to the age of forty years, namely: in order to guard the estate against the ill conduct and extravagance of his son, the will saying the testator 'hoped, by that time, his son would have seen his folly.'"

This determination of a case, in several respects very similar to the principal one, is forcible to show that Mary Ann Everts had no term for years in the estate devised; and that the testator, intending merely to put his son under the guardianship of his mother, it is fit that his last will should be construed in subserviency to that object.

The case of *Mansfield v. Dugard*, 1 Eq. Ca. Ab. 195, pl. 4; S. C. Gilb. Eq. Rep. 36, clearly evinces that the wife of the testator (M. A. Everts) had no term in the demanded premises. It was a devise to the wife of the testator till his son and heir apparent should attain twenty-one years of age, and then to his son. The son died at thirteen years old, and the wife continued to possess the estate until her son, had he lived, would have been twenty-one years of age. On a bill brought by the heir at law against the wife for an account of the profits after her son's death, it was decreed accordingly; although the wife was executrix, yet the estate not "having been devised for payment of debts, nor any creditors or want or assets appearing, it was held by the Lord Chancellor that the wife's estate determined by the death of the son, and that the remainder vested pres-

ently in the son, upon the testator's death, and was not to expect, till the contingency of his attaining his age of twenty-one years, should happen."

All the cases prove that the estate of Joel Everts, in the property devised, did not remain in contingency until his coming of age, but vested immediately in him on the death of the testator. To this purpose the judgment of the court in *Hayward v. Whitby*, 1 Burr. 228, is explicit. In that case the testator devised his messuages and tenements to Thomas Hayward and John Bates, and the survivor of them, and the heirs of the survivor, in trust, to employ the rents and profits thereof for the maintenance, education, and bringing up of Thomas and John Hayward, during their minorities; and when and as they should respectively attain their ages of twenty-one, then to the use and behoof of them, the said John and Thomas, and their heirs equally. Thomas died before the age of twenty-one. The heir at law, Whitby, entered into possession of his moiety; and John, now of age, brings ejectment, claiming the moiety of his deceased brother, as well as his own proper moiety. The question was, whether the estate vested immediately in the two nephews, upon the death of the testator, or remained in contingency, till their coming of age respectively. The court were of opinion that the estate immediately vested in the two nephews; and that there was no limitation of their interest, but only a limitation of the trust during their minority. In other words, that it was an immediate gift to the two nephews, with a trust to be executed for their benefit during their minority.

The same expression, with an alteration peculiarly adapted to the principal case, expresses our opinion on the manner and effect of its application. The testator gave to his son, Joel Everts, his estate immediately on his death, with a trust in his mother, Mary Ann Everts, to be executed for the benefit of her son, during his minority, if she should so long live.

Cases have been cited for the defendant in error, under the impression that they established a term in the mother by virtue of the devise, limited by the time when Joel Everts should or might attain the age of twenty-one years. A little attention will show that they do not support the purpose for which they were adduced. Waiving all observation on the peculiar phraseology of some of them, which was one ingredient in their determination, it is sufficient to remark that they differ from the principal case in these particulars, either they were devises

of property until the principal devisee should attain a certain age, without any expression which would even imply a limitation of the period in any possible event; or, superadded to the bequest they evinced, that the testator designed, for the payment of his debts, or other reasonable cause, that the devisee should be vested with an interest in the devised premises until the time mentioned should expire. In other words, the cases effectuate the manifest intent of the testator.

In the first class of the decisions referred to may be comprised *Dedicott's case*, 3 Leon. 9, and *Taylor v. Biddall*, 2 Mod. 289. The former was a devise to the testator's wife during the non-age of his heir; and the latter a devise to A. until B. should attain twenty-one, and after that to B. Nothing is there to show that the testator placed the estate in the hands of the devisee for the purpose of maintaining and educating his son, or with any other intent, than for her sole and exclusive use and enjoyment. In the other class may be included *Boraston's case*, 3 Rep. 19; *Balder v. Blackburn*, Hob. 285; *Courthope v. Heyman*, Cart. 25; *Stile v. Thompson*, Dyer, 210, pl. 24; and *Smith v. Havens*, Cro. Eliz. 252. In the case first mentioned, as was justly observed in *Lomax v. Holmedon*, the devise created a fund for the payment of debts; and to accomplish this object it is clear the testator intended that the devisee should hold this estate until the expiration of the time limited. *Balder v. Blackburn* was a devise to the wife until the daughter should attain eighteen years, without account, and she paying fines, and quit-rents. The latter expression unquestionably indicates the intention of the testator. In *Courthope v. Heyman*, the testator appointed M. Robinson his executor, to take the rents and profits of his land for and toward the maintenance of his respective children, till they became of full age respectively. The executor died before the trust was completed, and his executor was adjudged to have an interest in the land until the purpose of the testator was accomplished. *Stile v. Thompson* presents the case of a devise to executors until the full age of the heir, to pay debts and legacies, and to educate children. And the case of *Smith v. Havens* was a devise to the wife until the testator's son should attain twenty-one years of age, "to bring up his children." A particular comment on every case cited is obviously needless. Sufficient it is to remark that the devises, upon the face of them, bear incontrovertible marks of the testator's intention, and that the construction given was requisite to effectuate it.

Finally, the intention of the testator in the principal case warrants the claim of his son; there is no rule of law violated by permitting it to prevail; and the cases cited are in entire coincidence with our opinion. Of consequence, the judgment of the superior court in this case must be reversed.

HART v. TALLMADGE.

[2 DAY, 381.]

ACTION FOR DECEIT.—One who makes false representations to another by words and actions, with intent to deceive him, and the latter suffers damage in consequence, an action on the case will lie in his favor, though the defendant has no interest in making such representations.

CHALLENGE TO THE ARRAY.—A challenge to the array of the panel will not be allowed, for the reason that the clerk who issued the warrant to the constables to summon the jury is a party to the action.

ACTION on the case for a deceit. The declaration stated, That on the ninth September, 1803, Thomas Lloyd, Jr., a well known broker of Hartford, did, on behalf of one Joseph Hart, then of that city, offer for sale to the plaintiffs (the defendants in this court) through their agent, Heman Averill, an instrument in writing, purporting to be the promissory note of the defendant for two thousand dollars, payable ninety days after date at the Hartford bank, to the order of Willoughby Lynde and Joseph Hart, and bearing date the ninth of September, 1803; that on the back of said instrument were the names of said Lynde and Joseph Hart, purporting to be their genuine indorsement. That Averill, as agent of the plaintiffs, verily believing that said instrument was in all respects genuine, purchased, on behalf of the plaintiffs, said instrument from said Lloyd, as agent of Joseph, and paid therefor the sum of two thousand dollars of the money of the plaintiffs then being in said Averill's hands. That plaintiffs immediately deposited said instrument with the cashier of the Hartford bank, who, before the expiration of ninety days, notified Joseph Hart of such deposit, and of the time and place when payment was expected; but that said Joseph refused to pay the same, or any part thereof. That the instrument aforesaid and the indorsement of Lynde's name thereon are false and forged; that the same were falsely made and forged by Joseph Hart, for the purpose of fraudulently obtaining money thereby; and that such forgery was wholly unknown to the plaintiffs, their agent,

and to Lloyd, till the twenty-third day of December, 1803. That on the twenty-first of December, 1803, and after the expiration of ninety days from the date of the instrument, plaintiffs, by their agent, said Lloyd, notified the defendant that the same had not been paid, that it had become payable, and demanded payment thereof from the defendant. That defendant, well knowing that the note had been forged in pursuance of a fraudulent combination between Joseph and defendant, to defraud the creditors of Joseph and prevent plaintiffs from arresting said Joseph or attaching his property, and to secure to Joseph time to dispose of his effects and abscond from the state, did fraudulently conceal from plaintiffs' agent, Lloyd, the fact of said forgery, and falsely and deceitfully gave him to understand that the said instrument was authentic, and promised to see him, Lloyd, again and attend to his demand. That Lloyd, as agent of the plaintiffs, confiding in the honesty of defendant, and believing, from his representation, that said instrument was authentic, forbore to levy an attachment upon said Joseph for the contents of the instrument, as he otherwise would have done; and that at the time of this demand there was visible property of Joseph in Hartford more than sufficient to satisfy the same. That immediately after demand of payment, the defendant fraudulently advised and assisted said Joseph to abscond from the state; and that, acting upon such advice, Joseph did abscond on the night of the twenty-second of December, 1803, and has ever since remained out of the state; that before absconding Joseph disposed of all his property. That on the twenty-third of December, 1803, the defendant, upon a second demand of payment, informed Lloyd, as agent for plaintiffs, that said instrument was false and forged, and refused to pay the contents of the same, or any part thereof.

Upon the general issue pleaded, a verdict was found for the plaintiffs.

The defendant moved in arrest of judgment, for the insufficiency of the declaration; but the court adjudged the declaration sufficient.

After the jury were impaneled, the defendant excepted to the whole panel, on the ground that the jurors composing it had been illegally returned. The facts were: Frederick Wolcott, one of the plaintiffs, was clerk of the court, and had some time previous to the term at which this cause, with his knowledge, was assigned for trial, issued his warrants, without any special directions from the court, to the constables of four several

towns, to summon three freeholders from each of those towns to serve as jurors; by virtue of which the persons impaneled were drawn from the boxes provided for that purpose, and summoned accordingly. The court overruled the exception.

Griswold and Smith, for the plaintiff in error, critically examined the several averments in the declaration. Those which they principally considered were: 1. That the note was forged, which fact the defendant, in pursuance of a previous combination, and with intent to deceive and injure the plaintiffs, artfully concealed; 2. That he gave the agent to understand and believe that the note was genuine, and falsely represented that he had come to make arrangements for settling the claims against Joseph Hart, and promised to see the agent again soon and attend to the plaintiffs' demand; 3. That in consequence of such representation and promise, the agent forbore to attach property which Joseph Hart was at that time in possession of, to a sufficient amount to satisfy the debt; and, 4. That the defendant secretly advised and aided Joseph Hart to abscond.

With regard to these averments, they argued:

1. That mere concealment of a fact, however important to be known, or with whatever views the concealment may have been made, lays no foundation for an action of deceit. It makes no difference that this forgery was in the name of the defendant. In *Pasley v. Freeman*, 3 T. R. 51, the principles recognized by all the judges require something more than mere concealment to induce liability; and in *Eyre v. Dunsford*, 1 East, 818, the representations were grossly false.

2 That "the defendant gave Lloyd to understand and believe" is not traversable. The representation must be distinctly stated and its truth as distinctly denied. Plaintiffs further state, that "the defendant promised to see Lloyd again," etc., but do not allege that he did not see him again; there was no fraud in promising to see Lloyd.

3. It does not appear that plaintiffs sustained any damage by defendant's conduct. They forbore to attach; but they have not shown that if they had attached they would have secured their debt. And a creditor has no right to complain of any act done by a third person to the property of his debtor, until he has taken hold of that property. *Smith v. Blake*, 1 Day, 258.

4. Advising and aiding Joseph Hart to abscond could not give the plaintiffs a right of action before they arrested him. Counsel further contended that the defendant had no interest in the representations charged in the declaration, and that an interest

on the part of the person charged with making the representations, is necessary to support this action.

It was also urged that the exception to the array was well founded: 3 Bl. Com. 359, 365. That the clerk who selected the jury was interested in the action, and that he designated the boxes from which the names were to be drawn, without any direction or advice from the court: *Fowler v. Linley*, commonly called the *Gore case*, before the United States circuit court for this district.

Daggett and Gould, for the defendants in error, insisted that the objection that the allegations are not direct came too late after verdict: *Rushton v. Aspinall*, Doug. 679. As to the point that Hart had no interest in the question relative to which he made the representations, it is not necessary that he should have had: *Pasley v. Freeman*, 3 T. R. 51. One who deliberately deceives, having no interest to subserve, cannot be less guilty than he whose conduct is governed by a prospect of advantage to himself. As to the objection that nothing is stated by which the court can see that any damage has accrued to the plaintiffs below, it is expressly averred that Joseph Hart's person and property might have been taken between the time when defendant made the declaration to Lloyd and the time of the absconding; and that in an action for obstructing process, no more is requisite.

That as to mere concealment not rendering the defendant liable, counsel replied that although defendant might have kept silent on the subject, yet as he chose to speak, he was bound to disclose the truth, the whole truth material to be known. Comyns says: "An action upon the case for a deceit lies when a man does any deceit to the damage of another." *Eyre v. Dunsford*, 1 East, 318, is a case in point.

Upon the exception relating to the impaneling of the jury, counsel contended that the English cases did not apply; as in England the sheriff selects from the freeholders of the county, while here the clerk sends his venire to different towns, and the jurors are selected by the town council, by lot; that in the *Gore case*, the array was quashed because a deputy marshal interested in the case summoned the jurors, and must necessarily see them, thereby having an opportunity to influence them. Opposing counsel found their argument on the supposition that the jurors are not selected by the town council with impartiality, which the court will not allow.

By Court, HILLHOUSE, Assistant, dissenting. Judgment affirmed.

See the case of *Irwin v. Sherril*, 1 Am. Dec. 374, where a similar action was sustained.

STOYEL v. WESTCOTT.

[2 DAY, 412.]

JOINDER OF CAUSES OF ACTION. — Though tort and contract cannot be joined in the same declaration, yet where the gist of the action is tort, the declaration will not be held bad because it alleges that the transaction out of which the tort arose has been one of contract.

PLEADING A SPECIAL AUTHORITY. — Where a party claims to have acted under a special authority, and his action is founded on such authority, it should be set out with reasonable precision and certainty.

THE declaration stated that the plaintiff (defendant in this court), on the fourth of February, 1804, was legally deputed to serve a certain writ or process of attachment against Stoyel, in which Job Smith was plaintiff, demanding eight hundred dollars damages for a certain trespass alleged to have been committed by Stoyel; that the writ was signed by Thaddeus Learned, Esq., a justice of the peace, and by him and in his handwriting directed to the plaintiff as an indifferent person. That the plaintiff found Stoyel at one Carder's house (a defendant herein), on the evening of the same day, levied the writ and took him prisoner, and was about proceeding to jail with him, when defendants, with fraudulent intent to rescue Stoyel from plaintiff's custody, pretending that it would be inconvenient to take him to prison at that time, proposed that Carder should take charge of Stoyel and deliver him to plaintiff on the seventh of February following; that induced by the solicitations of defendants, and relying upon their integrity, plaintiff left Stoyel in Carder's custody; that Carder promised and engaged to deliver Stoyel to plaintiff as his prisoner, at the house of Oliver Leavins on the seventh of February; that Stoyel promised and engaged to remain in Carder's custody, and be forthcoming at the time and place aforesaid, and be the prisoner of the plaintiff; that the defendants, nevertheless, fraudulently contrived, with intent to injure the plaintiff, to have Stoyel escape from the state of Connecticut and the custody of the plaintiff; and that Stoyel, with and by the assistance of Carder, did escape from the state of Connecticut and the custody of the plaintiff before

the said seventh of February; that plaintiff has been put to great cost to retake the prisoner, and had to sustain sundry law-suits and pay out several sums of money, all in consequence of the before-mentioned fraudulent conduct of the defendants.

Not guilty was pleaded, and a verdict was found for the plaintiff. A motion in arrest was made for insufficiency of the declaration, but it was adjudged sufficient.

Ingersoll and Staples, for the plaintiffs in error, contended that the declaration was insufficient on two grounds: 1. The plaintiff, not being a known officer, but specially deputed, ought to have stated his authority precisely; the process should have been set out in the declaration. It does not appear that the writ was a legal one, that it was dated, that it was returnable to any court, that the duty thereon had been paid, in fact that it was not illegal and void; 2. *Assumpsit* and tort are joined; and a declaration in which these two causes of action are joined is bad, because the pleas to both are not the same: *Brown v. Dixon*, 1 T. R. 276; 1 Com. Dig. tit. Action, G.

Goddard, for the defendant in error, contended that as to the first objection, the law in this state must be considered as settled, in his favor, by the case of *Dennison v. Gallup*, Kirby, 430, where the averment was, that plaintiff "was lawfully authorized and empowered to serve;" the averment in this case being "legally deputed to serve."

Counsel further argued, that although it was determined in *Clinton v. Hopkins*, 2 Root, 225, that contract and tort could not be joined, yet that decision was overruled by *Buel v. Carpenter*. But it was contended, that this was an action on the case, to which not guilty had been pleaded; and that if it were *assumpsit*, with the same plea, no advantage could be taken of it after verdict.

By COURT. Amos Westcott, Jr., brought his action on the case against Isaac Stoyel and William Carder; averring that he was legally deputed to serve an attachment, which issued against Stoyel in favor of Job Smith, was signed by Thaddeus Learned, justice of the peace, and directed to the said Westcott as an indifferent person; that by virtue of the writ, he arrested the body of Stoyel at the house of Carder, and that Stoyel and Carder, with a fraudulent intent to rescue the said Stoyel from the custody of the said Westcott, and to procure him an opportunity to escape, proposed to receive him into their custody and to redeliver him to the said Westcott at a day

and place mentioned, so that he might be conveyed to prison; that in consideration of this engagement, the said Stoyel was confided to their custody; but that, instead of being redelivered, the said Stoyel and Carder combined to permit the said Stoyel to escape and depart out of the state; “and that the said Stoyel, with the consent, connivance, and assistance of the said Carder, did escape and depart into the state of Rhode Island, to the great damage of the said Westcott.”

The defendants (below) went to trial on the plea of not guilty; verdict was rendered against them; and, on motion in arrest for the insufficiency of the declaration, the same was adjudged sufficient. 1. It is now objected, that the declaration was insufficient inasmuch as tort and *assumpsit* were therein joined. If this were the fact, the judgment of the superior court unquestionably would be erroneous. *Assumpsit* and tort may not be joined in one declaration, because they do not admit of the same plea and judgment: 1 T. R. 276; 2 Wils. 319, 322; 3 Wils. 354. But, on inspecting the record, it plainly appears that the action is wholly founded in tort. The contract is disclosed merely by way of inducement, and the gist of the action is the misfeasance. The plaintiff has alleged his *gravamen*, as consisting in a breach of duty, arising out of a fraudulent combination to procure the escape of Stoyel, and in his subsequent escape by the assistance of the defendants.

That the action might have been legally founded on contract is no criterion in this case. It is sufficient to say that the plaintiff, who had it in his option to commence such an action as he considered best adapted to the nature of the injury, has elected to lay the *res gesta* in tort. Nor is this proceeding unprecedented. In *Dickon v. Clifton*, 2 Wils. 319, a count founded on the undertaking of the defendant to transport a quantity of malt, which, by reason of his neglect and improvidence, became embezzled and wholly lost, was determined to be laid in tort. To the same purpose is the case of *Govett v. Radnidge et al.*, reported in the third of East, page 62. The declaration alleges that the defendant had the loading of a hogshead of the plaintiff in and upon a certain cart, for a reasonable reward, but so carelessly, negligently, unskillfully and imprudently conducted that by reason thereof the said hogshead was let fall, and the contents thereof lost. The only question in the case was whether the action was laid *ex contractu* or *ex delicto*. The court were clearly of opinion that it was founded in tort. Judgment in the case of *Samuel v. Judin*, 6 East, 333, was founded on the

same principle. One count in the declaration alleged a delivery of two promissory notes to the defendant, who, for a commission, was to procure them discounted for the plaintiff. "But contriving and fraudulently intending to deceive and defraud the plaintiff in this respect, (the defendant) did not, though requested, pay the said sum of money so by him received as and for the discount of said two notes to the plaintiff; but, on the contrary, converted and disposed thereof to his own use." With this count was joined another in trover, and it was objected that the declaration was ill, as tort and contract could not be joined. The principle was admitted by the court, but was considered inapplicable, for that both counts were founded in tort.

2. It is further objected, that it does not appear that Westcott acted under legal authority; and of this opinion is the court. He was an officer appointed by special deputation, and it was incumbent on him to show, with reasonable precision and certainty, that he was duly authorized. To this end it must appear that the writ under which he acted was legally issued and directed, and that the arrest was legally made. But the declaration sanctions no part of this proposition. A brief enumeration of particulars will evince that the writ was utterly invalid, and that Westcott was entirely destitute of authority.

To every writ a date is essential. If there be no date, it cannot appear that the person signing the writ, at the time of affixing his signature, had any authority, or that the action was brought, as it should be, to the next court. But the plaintiff (below) has not alleged, nor does it appear, that the attachment had any date. A valid writ must be signed by proper authority, and this must appear to the court. To determine whether the justice signing was duly authorized, it is indispensably necessary that the court to which the writ is returnable should be mentioned. But the writ of attachment, in this case, was signed by a justice, and it does not appear to what court it was returnable. To the validity of a writ of attachment duty and bonds are requisite. But it does not appear by direct averment, by necessary inference, or even by presumption of an inferior kind, that this requisite, in the case under consideration, was complied with. The only allegation bearing on the point is this, that there was a certain writ, signed by a justice, and delivered to the plaintiff (below) to serve. It is likewise necessary to the validity of a writ that it be made returnable to a court having competent jurisdiction. But, in this case, it

does not appear that the writ was returnable to any court whatsoever. It is not only indispensable to the validity of a writ, but to the authority of the officer serving it, that it be duly directed to him by competent authority. But, in the case under discussion, it does not appear that the justice had any authority to sign the writ, much less to direct it to an indifferent person.

On the whole, it is perfectly compatible with the declaration of the plaintiff (below) that the process directed to him was utterly invalid, and that the arrest of Stoyel was illegal and unjustifiable.

The judgment of the superior court, in consequence, must be reversed.

CARTER v. CARTER.

[2 DAY, 442.]

JOINT AND SEVERAL OBLIGATION.—The obligatory part of a bond was in these words: “We are holden and bound unto M. C., in the sum of five hundred dollars, for the payment of which we bind ourselves and each of us.” This was held a joint and several bond, on which an action could be brought against one of the obligors separately.

ACTION of debt on a bond. The declaration alleged, “That the said John (the defendant below), on the first day of October, 1799, together with one Daniel Carter, Abel Carter, Pomeroy Newell, and Giles Lankton, by his certain writing obligatory, sealed with his seal, and also sealed with the seal of the said Daniel, Abel, Pomeroy and Giles, bearing date the day and year aforesaid, acknowledged himself to be held and firmly bound, unto the said Marcy Carter (the plaintiff below), in the penal sum of five hundred dollars.”

The defendant having prayed oyer of the bond, set it out, with the condition annexed. The obligatory part of the bond was as follows: “We, John Carter, Daniel Carter, Abel Carter, Pomeroy Newell and Giles Lankton, are holden and bound unto Marcy Carter in the sum of five hundred dollars, for the payment of which sum well and truly to be made, we do hereby bind ourselves, and each of us, our executors and administrators and each of them.” By the condition, this bond was defeasible on the payment of one hundred dollars, annually, during the life of the obligee. The defendant then pleaded in bar a judgment of the court of common pleas, in Hampshire county, Massachusetts, in favor of the plaintiff against Abel Carter, on the same bond, for the amount of the penalty, and execution to issue for the first installment.

To this plea the plaintiff demurred; and the court adjudged the same insufficient.

Pitkin, for the plaintiff in error, contended: 1. That the declaration, on its face, was bad. It begins by declaring upon a joint bond, executed by the defendant and four others, and concludes by alleging that the defendant bound himself severally, without showing how the others were bound, or that they had bound themselves at all.

2. That the judgment in Massachusetts was a good bar. Where a bond is confessedly joint, a judgment against one of the obligors binds all. To show that this was not a joint and several bond, the counsel argued that the subsequent words "we bind ourselves, and each of us, our executors and administrators, and each of them," did not change the nature of the bond, but that "we bind ourselves" was as clearly a joint obligation, as "we jointly bind ourselves;" citing *Watts v. Goodman*, 2 Ld. Raym. 1460; *Wigmore v. Wells*, 3 Leon. 206; *Spencer v. Durane*, 1 Show. 8, pl. 16. Most of the cases opposed to this construction, which we contend for, are cited by Viner with a *dubitatur*: 16 Vin. Ab. 56 (G).

Bradley, for the defendant in error, contended that the use of the technical words "joint and several" was not necessary to render an obligation joint and several; that it was sufficient for this purpose if any words are used which plainly import the same thing. That the words of this bond, "we bind ourselves, and each of us, our executors and administrators, and each of them," obviously imported an obligation imposed upon all and each of these persons collectively and individually: Dy. 196, pl. 114; *Hankinson v. Sandilaus*, 2 Bulst. 70; S. C. Cro. Jac. 322; 8 *Brook's cases*, 21, pl. 102; 2 Rol. Ab. 148; Dy. 310 b, pl. 80; 16 Vin. Ab. 36, Obligation (G.); Co. Litt. 144 b; 5 Bac. Ab. 164. To the objection that the bond was not declared upon as joint and several, counsel answered that sufficient was alleged to show the several liability of the plaintiff; and that it would be useless to particularly state how each of the other obligors was bound, the action not being against them. With respect to the plea in bar, the plaintiff in error being severally bound, it is no excuse for his non-performance of this contract; that other persons were likewise bound, and failed to perform it. It is true the defendant in error can have but one satisfaction; but until that be obtained, he may pursue his several remedies against the obligors on this bond. The judgment pleaded in

bar is a recovery of the first installment only, but the other installments mentioned in the condition of the bond are not answered by this plea, which can, therefore, be no bar to this action.

By Court. Judgment unanimously affirmed.

It is the tendency of the law to regard an obligation undertaken by several parties as joint, when there are no express words indicating a several obligation: 1 Pars. Cont. 11. This author says: "Whether the liability incurred is joint or several, or such that it is either joint or several, at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express; and where they are not express, upon the intention of the parties as gathered from all the circumstances of the case." Id.

If an instrument worded in the singular is executed by several, the obligation is a joint and several one, and those who so execute it may be sued either separately or together: *Marsh v. Ward*, Peake Cas. 130; *Clerk v. Blackstock*, Holt, 474; *Hemmenway v. Stone*, 7 Mass. 58; *Van Alstyne v. Van Slyck*, 10 Barb. 383. The civil code of California, sec. 1660, follows this rule, and provides: "A promise made in the singular number, but executed by several persons, is presumed to be joint and several."

TURNER v. HUBBELL.

[2 DAY, 457.]

STATUTE OF FRAUDS—PAROL AGREEMENT TO ANSWER FOR ANOTHER'S DEFAULT.—A. sold and converted goods to his own use which he had undertaken to transport to a place of destination. The owner being about to institute a suit against him for damages, B., the father of A., promised the owner, by parol, that if he would forbear to sue A., and would institute a suit against C. and should fail to recover, he would pay the damages. The owner did, accordingly, forbear to sue A., and instituted suit against C. but failed to recover. It was held that this promise of B. was within the statute of frauds.

ACTION of *assumpsit*. The declaration stated that Richard Hubbell, Jr., a son of the defendant, received on board of a sloop, of which he was the commander, at Newbern, North Carolina, sundry articles of merchandise belonging to the plaintiff, to be transported to New York as freight; that said Hubbell, in consideration of a reasonable sum paid to him for the freight, promised to transport said articles to New York, and there deliver the same to plaintiff's consignee; that he neglected to perform his promise, and sold and converted said articles to his own use, whereby the same were wholly lost to the plaintiff. That plaintiff afterward applied to said Hubbell

and demanded satisfaction for the injury, and proposed to institute a suit against him; whereupon the defendant requested the plaintiff to forbear to sue his son, and to institute his suit against one John Selby, who, the defendant declared, was equally concerned in the fraudulent transaction, and was the real owner of the sloop and received the avails of the property. That to induce the plaintiff to forbear to prosecute said Richard Hubbell, Jr., and to seek a recovery from Selby, the defendant assumed and promised to pay to plaintiff the amount of his damages if he would prosecute Selby to final judgment; and in case of judgment in plaintiff's favor that defendant would pay plaintiff such an amount as should be returned unsatisfied, upon execution, against Selby; that in consideration of this promise plaintiff forbore to sue Richard Hubbell, Jr., and instituted suit against Selby; that plaintiff produced all the proof which he could obtain, in order to recover against Selby, but failed of all which defendant had notice.

The general issue was pleaded; and the plaintiff offered parol testimony in proof of the promise as alleged in the declaration. To the admission of this testimony defendant objected, on the ground that said promise, not being reduced to writing, was within the statute of frauds and perjuries. The court ruled out the testimony, and a verdict being found, and judgment rendered in favor of the defendant, plaintiff filed his bill of exceptions.

Daggett and Fairchild, for the plaintiff, contended that the promise was not within the statute on two grounds: 1. Because the statute regards defaults or miscarriages arising out of contracts only, but not promises for wrongs done; 2. Because this was an original undertaking by the defendant, upon a new and sufficient consideration: *Read v. Nash*, 1 Wils. 305; *Williams v. Leper*, 3 Burr. 1886; *Castling v. Aubert*, 2 East, 325; *Houlditch et al v. Milne*, 3 Esp. 86.

Ingersoll and R. M. Sherman, for the defendant in error, argued: That from the words of the statute "any special promise to answer for the debt, default, or miscarriages of another person," the following definition of the promise intended is deducible: "An undertaking by a person, not before liable, for the purpose of securing or performing the same duty for which the party for whom the undertaking is made, is, at the same time, liable." That the following promises, not being within this definition, are exempt from the operation of the statute:

1. By a person before liable. As, if one or two or more joint debtors promises to pay the whole debt, he will be severally liable on this promise. For in such a case there are none of the temptations to fraud contemplated in those to which the statute extends; as the creditor will be as safe with a joint as with a several liability of the promisor. In *Stephens v. Squire*, 5 Mod. 213, a note in writing was held unnecessary, "it not being a promise solely for the debt of another." The ruling of Lord Kenyon, in *Winckworth v. Mills*, 2 Esp. 484, that a promise by the indorser of an unpaid note to indemnify the holder, if he would proceed to enforce payment against the other parties to the note, ought to be in writing, is much questioned, and the reasoning of Lord Ellenborough in *Castling v. Aubert*, 2 East, 825, is strongly corroborative of the doctrine of *Stephens v. Squire*;

2. A promise not for the purpose of securing or performing the original duty, although such security or performance may be the consequence. Thus, in the case of *Tomlinson v. Gill*, the defendant promised the widow and administratrix of the intestate, in consideration that he might administer with her to make up the deficiency of assets for payment of debts, and upon a bill filed for a discovery and payment, Lord Chancellor Hardwicke held that the case was not within the statute. In *Castling v. Aubert*, and in *Anstey v. Marden*, 1 New Rep. 130, this principle is applied;

3. A promise not for the performance of the same duty: *Read v. Nash*, 1 Wils. 305; *Buckmyr v. Darnall*, 2 Ld. Raym. 1035, S. C. 6 Mod. 184; S. C. 1 Salk. 27;

4. A promise is not within the statute if there is not a contemporary liability of the promisor, and of the party for whose benefit it is made: *Matson v. Wharam*, 2 T. R. 80; *Jones v. Cooper*, Cowp. 227; *Anderson v. Hayman*, 1 H. Bl. 120; *Keate v. Temple*, 1 Bos. and Pul. 158; *Masters v. Marriott*, 3 Lev. 363; *Harris v. Huntbach*, 1 Burr. 873; *Watkins v. Perkins*, 1 Ld. Raym. 224; *Buckmyr v. Darnall*, 2 Ld. Raym. 1085. The law is the same, where the party originally chargeable, by circumstances which in their time or their nature are previous to the promise, becomes exonerated, so that he is not liable *eo instanti*. This is the only point under the statute of frauds, decided in the case of *Williams v. Leper*, 3 Burr. 1886, relied upon by plaintiff's counsel. The facts in that case were: Williams, a landlord, distrained for rent due from Taylor, his tenant, and had the goods in his custody. He parted with them to Leper,

the agent of Taylor's creditors, on his promising to pay the rent for which the goods were liable as a pledge. The decision turned upon the point that Taylor was not liable at all when Leper made the promise. The opinion of Lord Eldon, in the case of *Houlditch v. Milne*, 3 Esp. 86, on which plaintiff also relies, is grounded wholly upon a reference to *Williams v. Leper*, to which it is, however, directly opposed, and can have but little weight. The promise in this case has no quality to exempt it from the operation of the statute; it is an undertaking by the defendant, a person not before liable, to pay the same damages, *eo nomine*, to which Richard Hubbell, Jr., was and continues liable. As to the objection that the statute does not embrace a promise to answer for the tort of another, no such opinion can anywhere be found; and the plain words of the statute furnish the best reason why the question was never raised before.

Plaintiff's counsel contend that the new consideration, the forbearance to sue Hubbell, Jr., and the prosecution of Selby, renders this an original undertaking by the defendant; but no case will warrant this position. In *Tomlinson v. Gill*, Lord Hardwicke, indeed, observes: "The modern determinations have made a distinction between a promise to pay the original debt, and on the foot of the original contract, and where it is on a new consideration." But it is noticeable that "where it is on a new consideration," is put in contradistinction to a promise to pay the original debt, and on the foot of the original contract. He could mean no more than that the promise was not for the original debt, but for a new and distinct purpose. In *Rotherby v. Curry*, 3 Burr, 1877; *Fitch v. Hutchinson*, 2 Wils. 94; *Chater v. Beckett*, 7 T. R. 201, there was a new consideration, but they were all held to be within the statute. That part of the promise, respecting a reimbursement of the plaintiff's expenses in prosecuting Selby, had it constituted the whole agreement, would not have been within the statute; the evidence, however, was not admissible to enable the plaintiff to recover for that only, as a contract is in its nature entire, and no part can be proved, if any be within the statute of frauds: *Chater v. Beckett*.

By COURT. Judgment unanimously affirmed.

Browne, in his work on the Statute of Frauds, page 145, shows that for some time it was doubted, in England, whether the statute was applicable to a promise to answer for another's tort. He says: "Holroyd, J. (*Kirkham v. Marter*, 2 B. & A. 613), considered 'miscarriage' and 'default' applied to a promise to answer for another with respect to the non-performance of a duty, though not founded on a contract. The same point has been decided in Connecticut, and the statute held applicable to cases of tort in *Turner v. Hubbell*, 2 Day, 457."

AUSTIN v. BURBANK.

[2 DAY, 474.]

ASSIGNMENT OF MORTGAGE DEBT.—An assignment of the mortgage debt without a conveyance of the legal title to the mortgaged premises, is sufficient to entitle the mortgagee to sustain a petition for foreclosure.

DEMAND OF MORTGAGE DEBT BEFORE FORECLOSURE.—Where a mortgage deed was given to secure a bond to the treasurer of the state, with interest payable annually, it was held that any delay of payment of interest was a forfeiture of the bond, and that a petition for foreclosure might be sustained without showing a special demand of the principal.

PETITION in chancery against the representatives of Seth Austin, deceased, for the foreclosure of their equity of redemption in certain mortgaged premises. The petition stated: That on the twenty-eighth of March, 1803, Seth Austin, since deceased, mortgaged his farm to the state of Connecticut, and by the condition of the mortgage deed it was provided that said Austin should, without delay, pay the principal and interest of a certain bond by him executed, of that date, for the sum of four thousand dollars, payable to the treasurer of the state, and his successors in office, on demand, with interest payable on the second of September annually. That the petitioners (Burbank *et al.*) purchased the said mortgage from the state, on the twenty-eighth of July, 1806; and that, at that time, Andrew Kingsbury, then treasurer of the state, assigned to them said mortgage, by an assignment in usual form indorsed on the bond, and by a deed of release and quitclaim in usual form, and duly executed; which deed of mortgage and release were recorded in the proper office. That by virtue of said assignment, the interest of the state in said lands became vested in the petitioners. That no part of the principal and interest on said bond has been paid, though often requested.

The respondents, confessing the assignment of the bond to the petitioners, pleaded that two hundred and forty dollars interest on said bond had been paid, and accepted by the state treasurer, and had been indorsed thereon in full, up to the second of September, 1805, prior to the assignment thereof. That on the second of September, 1805, respondents tendered petitioners two hundred and forty dollars in satisfaction of interest due on the bond, which has since been received by petitioners. And that no demand had been made for the principal sum previous to the service of the petition.

The petitioners demurred to this plea, which the superior

court adjudged insufficient. Respondents then answered, denying the facts stated in the petition. The superior court found all the facts stated in the petition to be true, except that they did not find that the title to the land was conveyed to the petitioners by said deed of release from the treasurer of the state; and found due on the mortgage four thousand one hundred and twenty-two dollars, and decreed that the same and interest should be paid in two years, and on failure that the respondents should be foreclosed.

Ingersoll, for the plaintiffs in error, contended that judgment ought to be reversed: 1. Because no demand had been made for the money previous to the commencement of the suit; 2. Because no legal title to the mortgaged premises is found in the petitioners, and an equitable title only is not sufficient.

Bradley, for the defendant in error, argued that the bond, being payable on demand, is due instantly, and a suit may be brought immediately without any special demand; that if a suit could be sustained on this bond immediately, upon the ground that the condition thereof had been broken, then the condition of the deed was broken also, and an action of ejectment for the land on a petition to foreclose the equity of redemption, would have lain immediately. Still, if the money had not been payable immediately without a special demand, the mortgagor could not have a longer time than his life in which to pay it; and not having done so, the condition of the deed was broken: *Alsop v. Hall*, 1 Root, 346; Co. Litt. 208 b. The condition of the bond is that the interest is to be paid annually on the second of September; the plea does not allege that any interest was paid at the time it fell due; the condition then was broken, and the interest might as well never have been paid: Esp. Dig. 210. The expression "indorsed in full" means that the whole sum of two hundred and forty dollars was indorsed; and not that the whole interest due on the second September, 1805, was paid and indorsed; the interest then due was five hundred and eighty-three dollars and thirty-four cents; and payment of a less sum cannot be pleaded in full for a greater, except under an accord, and no accord is here stated.

2. As to the point that the petitioners are not vested with the legal estate; a right to the money secured by mortgage, though not coupled with the legal estate, in the lands mortgaged, is a sufficient title in the petitioner on which to found a decree of foreclosure: *Williams v. Smith*, September term of superior court, Hartford county, 1806. That the legal title

cannot be drawn in question on a bill to foreclose was solemnly decided in *Owen v. Granger*, February term, 1802, Hartford county: 2 Pow. Mont. 1043. The person holding the mere legal estate is the trustee of him who has a right to the mortgage money; and although he may have gained a release of the equity of redemption from the mortgagor, this will not protect the legal estate in his hands: *Lawrence v. Knap*, 1 Root, 248 [1 Am. Dec 42].

By Court. Judgment unanimously affirmed.

LEWIS v. HAWLEY.

[2 DAY, 495.]

SLANDER, WORDS ACTIONABLE PER SE.—Saying of a drover, whose business it is to purchase cattle, drive them to market and sell them, that he is a bankrupt, is actionable without special damage being proved.

ACTION of slander. The declaration alleged that the plaintiff (Hawley), for more than twenty years had exercised the trade and business of a drover, and purchaser and packer of provisions, and had been in the constant practice of purchasing large droves of cattle on credit, and for ready money, and driving them to market, and then selling the same, by which he made great profit and gain; that the defendant, in the hearing of divers people of this state, uttered and published of and concerning the plaintiff the following malicious, false and defamatory words: "Isaac Hawley is a bankrupt, and is not able to pay his just debts." That thereby plaintiff has been greatly injured in his business and his credit destroyed.

The defendant pleaded not guilty, and the jury found a verdict for the plaintiff. The defendant then moved in arrest of judgment: 1. For irregularity in drawing the names of three of the jurors who tried the cause from the boxes; and, 2. Insufficiency of the declaration. To this motion no answer was made in writing, but the parties were heard thereon before the court. The first exception was found to be untrue, and the second was adjudged insufficient.

Ingersoll and Smith, for the plaintiff in error, contended that the declaration was insufficient, as no special damages had been stated. These words are not actionable in themselves, and if any injury has accrued it must be stated specially; 2. The motion in arrest ought to have been answered; the settled practice

of this court and propriety requires that this should be done. The judgment without such answer is irregular and ought to be reversed. *State v. Worthington*, decided twenty years ago, is in point.

Daggett and R. M. Sherman, for the defendant in error, contended: 1. That the allegations in the declaration were not only sufficient after verdict, but were more precise than usual. They show that the plaintiff might have been subject to the bankrupt law, and it will not be denied, that to say of such a trader that he is bankrupt, is actionable in itself. The question is, has the man traded at all, not how much has he traded? 2. To go into special pleading on a motion in arrest is a departure from correct practice. It is never done in Westminster Hall, nor in the neighboring states. The practice is not universal in this state. There are sixteen motions in arrest reported in Kirby, and to no one of them is there an answer.

By COURT. Judgment unanimously affirmed.

STATE v. WOODRUFF.

[2 DAY, 504.]

DISCHARGE OF JURY IN CRIMINAL CASE.—Where the defendant has been put on his trial and the jury are unable to agree upon a verdict, the court can, in its discretion, even against the consent of the defendant, discharge the jury; and this will not be a bar to a trial before another jury for the same offense.

PROSECUTION before a justice, on the complaint of a grand juror, for unlawfully voting. The complaint stated that the defendant, not being a freeholder of the state, nor a lawful inhabitant of Durham, nor a householder, “and who had not, on said tenth day of December, a freehold estate rated in the common list at nine dollars, or personal estate rated in the said list at one hundred and thirty-four dollars, and who had never been in any way or manner qualified to vote in town meeting, or thereto admitted did vote,” etc. A conviction was had before the justice, and the defendant appealed to the county court.

The case was first heard in January, 1806; and the jury to whom it was committed, after having had it several days under consideration, could not agree. The attorney for the state proposed that the court should take back the papers and discharge the jury, to which the defendant and some of the jurors objected. The court waited until the afternoon of the last day of the session, and then directed the jury to deliver up the papers,

which they accordingly did, and the cause was continued. At the March term the cause came on again to be tried. After the jury were impaneled, and not guilty pleaded, an objection to the testimony was taken *ore tenus*, that there having been one trial the defendant could not be again put in jeopardy; which objection was overruled. In the course of the trial the defendant, to show that he was qualified to vote in said town meeting, offered in evidence a deed of a certain piece of land, dated October 13, 1804, accompanied with proof that he immediately took, and had ever since retained possession, and that the land was ratable at more than nine dollars in the common list. This evidence being objected to by the attorney for the state, the court excluded it on the ground that it was irrelevant, inasmuch as the land was not in the defendant's list for the year in which he was charged with voting illegally. The jury found the defendant guilty, and judgment was rendered against him.

On a writ of error to the superior court the judgment of the county court was reversed, on the ground that it is a person's owning real estate to the amount of nine dollars, as rated in the common list, which qualifies him to vote in a town meeting, and not his being rated for it by having put it into his list.

Daggett and Gould, for the plaintiff in error. 1. The former proceedings in January, 1806, are relied upon, by the defendant in error, as showing that the court had not jurisdiction, or were precluded from trying the case again. To this it may be answered that the objection was taken *ore tenus*, whereas, if available at all, it should have been pleaded: *Roche's case*, Leach's Cro. Ca. 138; Foster's C. L. 16. In any view it could not support an objection to the admission of evidence. Advantage of a former acquittal could not be taken *ore tenus*; nor could a former conviction be thus available: 4 Bl. Com. 335.

The question, upon the merits of this objection, is, can the case be tried again by another jury, after the first jury had been discharged because they could not agree upon a verdict? It is a fair presumption that the first jury were not unnecessarily discharged. "We must," says Lord Ellenborough, "give credit to the court below for having exercised its jurisdiction soundly:" 5 East, 33. Besides it appears the jury were not discharged till the last day of the court.

That the jury should be discharged, where they have had a case long under consideration, and have been unable to agree, is a matter of such general convenience that nothing but the most

settled rule of law ought to prevent its being done. The *dictum* in Carthew, 465, that at common law, the jury can be discharged of the issue in any case, without the consent of the prisoner, nor in capital cases with it, if ever uttered, is false in both its parts. That the jury may be discharged in capital cases, see 2 Hawk. P. C. 622, sixth edit.; *Kinloch's case*, 1 Wils. 157, S. C. Foster 16; *Wedderburn's case*, Foster, 22. That in cases not capital the prisoner's consent is not necessary, see Dr. and St. 171; *Ferrar's case*, T. Raym. 84; Foster 27, 28, 31, 32, 33; 2 Hawk. P. C. 622. In most of the cases in which it has been held that the jury could not be discharged, the only reason for discharging them was that the prosecutor was not prepared with evidence; none are the cases where the jury could not agree.

The rule is not, that one cannot be twice tried or put on trial for the same offense; but, that "*nemo bis puniri*, 4 Co. 43; nor be twice put in jeopardy of his life: Foster 23; 1 Wils. 157. The defendant in this case was not tried twice; to try is to bring to the test; and this cannot be done without a determination of the suit.

A right to discharge the jury implies that the defendant may be twice put on trial: 2 Hal. P. C. 297; 2 Hawk. P. C. 627; *Woodfall's case*, 5 Burr. 2661; *The People v. Barret*, 2 Caines, 100, *post*, 239. New trials in cases of misdemeanors have been granted against the defendant: 4 T. R. 753; 5 Id. 20; and for the defendant, for any reasonable cause: 4 Bl. Com. 361. That a jury, unable to agree, may be discharged, and the defendant afterward brought to trial before another jury, has been established in New York after a full and able discussion: *People v. Olcott*, 2 Johnson's Cases, 801 (1 Am. Dec. 168).

2. But the principal question is, whether the deed of the land, not rated in the defendant's list was admissible. It is said that if the person has ratable land, though not actually rated, he may vote. But the reason of the law forbids this construction. It undoubtedly was intended that those who vote to tax others should, *uno flatu*, tax themselves. Exempts may not vote: Stat. 403, edit. 1796. Having taxable property is a necessary part of the qualification, but the governing reason is, having it taxed. The statute relative to the admission of freemen requires personal property actually rated in the voters-list: Stat. 217, edit. 1796. So, also, the statute concerning societies: Id. 403; and that relating to towns: Id. 415.

The case of *State v. Doane*, 2 Root, 453, in which it was said that the property of jurors need not be rated, is not applicable;

1. The statutes are not *in pari materia*; jurors are not voters of taxes; 2. Their independence and verdict are not influenced by the actual rating of their property, but by their having property that is ratable; 3. The opinion in that case, upon this point, was *obiter*. The proposition, that the deed should have been admitted as evidence of a part of the qualification, cannot be sustained; the qualification is one entire thing, consisting of two facts dependent on each other; neither is competent without the other.

Huntington, for the defendant in error, submitted, without argument, the question as to the power to discharge the first jury, and bring the defendant to a second trial before another; and as to the second question, contended that it was the having ratable property, although not actually rated, that entitled a person to vote at the town meeting. That the legislature did not intend that liability to taxation was a necessary incident to the right of voting; freemen, though paupers, are allowed to vote. That were this the intention, the amount of property requisite would have been the same, whether real or personal. That the legislature meant to admit those who, by lawful residence, and the possession of the property specified at the time of voting, exhibited that evidence of their industry and interest in the welfare of society. That the list was not the prescribed evidence of the property entitling a person to vote; were this the true principle, a pauper, by giving in a list, might thereby vote. The statute relating to freemen does not countenance the idea that those only shall vote who, at the time of voting, are liable to be taxed for the property by which they are qualified; nor does the act respecting societies warrant any other inference than that it is the amount of property and not its listing that qualifies. That *State v. Doane* has construed the act relative to jurors, in which the phrase is "shall have a freehold estate rated in the general list at nine dollars or more," and it is immaterial to the merits of that decision that the objection it was calculated to remove was groundless, and not presented by the facts.

By Court. Judgment unanimously reversed, on the ground that the qualification required by statute is the having a freehold estate actually rated in the common list at nine dollars; and that the having such estate ratable in the list at that sum is not sufficient.

This case is cited as to this point in 3 Wharton's Cr. L., sec. 3169, and also in 1 Bishop's Cr. L., sec. 1033.

CASES
IN THE
SUPREME COURT
OF
NEW YORK.

CRUGER v. ARMSTRONG.

[3 JOHNSON'S CASES, 5.]

CHECK CONSIDERED A BILL OF EXCHANGE.—Bank checks are considered as inland bills of exchange, and may be declared on as such.

HOLDER NEED NOT PROVE CONSIDERATION.—The holder of a bank check or bill is *prima facie* the rightful owner, and is not bound to prove a consideration, unless circumstances of suspicion appear.

PRESENTMENT FOR PAYMENT.—The holder of a check is bound to use due diligence in obtaining the money, and must present it and demand payment within a reasonable time.

ACTION of *assumpsit*. The declaration contained three counts: 1. For money had and received to the use of the plaintiff; 2. For money paid, etc.; 3. On an *insimul computassent*. The defendant pleaded *non-assumpsit*.

The case was tried at the New York circuit, the twenty-third December, 1800, before LEWIS, J. The plaintiff introduced in evidence a check drawn by the defendants, in the handwriting of Armstrong, as follows:

“Cashier of the bank of New York, pay to W. & J. C., or bearer, twenty-five hundred dollars. New York, the twelfth of April, 1796.
ARMSTRONG & BARNWALL.”

The defendants objected to the check as evidence, under the counts in the declaration; that it was an inland bill, and ought to have been declared on as such, and insisted, however, that the plaintiff ought to prove that payment had been demanded at the bank. It was proved that on the day the check was drawn, checks of the defendants on the same bank, to the amount of three thousand five hundred dollars, had been paid,

and at the hour of closing the bank business there was a sum of four hundred dollars to defendants' credit; that the defendants were merchants of credit, and were in the daily practice of paying money into and drawing it out of the bank until the dissolution of their partnership, on the second of July, 1798. It was also proved that the defendants never had any consideration for the check, which was lent to one Pfister & Macomb, for their accommodation, and had been transferred by them through a broker to the plaintiff. Under instruction of the court the jury found a verdict for the plaintiff.

A motion was made at the last term to set aside the verdict, and for a new trial.

Hamilton, for the defendants.

B. Livingston, for the plaintiff.

RADCLIFF, J. Three objections are made on the part of the defendants: 1. That the check could not be given in evidence under any of the counts in the declaration; 2. That it was incumbent on the plaintiff to show that he came lawfully into possession of it; 3. That the plaintiff ought to have presented the check and demanded payment at the bank.

With respect to the first objection, considering the check either as a bill of exchange, or a draft of any other description, the plaintiff would be equally entitled to give it in evidence under the money counts. It appears to be settled in practice, 1 Salk. 283; Str. 725; Burr. 1516; 6 T. R. 123; Chitty, 190, 197, that the payee of a promissory note or bill of exchange may, as against the maker or drawer, declare for money lent and give the note or bill in evidence. In the present instance the bill or check was payable to bearer, and the plaintiff, whether the first or a subsequent bearer, stands in the same relation as the payee of any other bill.

The second objection is also untenable. Whatever may formerly have been supposed to be the rule on this subject, I think that the necessity of showing that the possessor is lawfully entitled to the bill, has been properly dispensed with. The holder must *prima facie* be deemed to be the rightful owner: Chitty, 51; 1 Burr. 1516; and it has accordingly been held that he need not prove a consideration except where circumstances of suspicion appear.

The third objection appears to be more important. A check, although generally received as cash when given in payment, is in form and reality a bill of exchange. It possesses all the

requisites of a bill, and has been treated as such. It has been held to be negotiable, and may be declared upon as a bill of exchange: Chitty, 16; 7 T. R. 424. It is therefore necessary to be presented for payment, and is generally subject to the same rules. The draft itself implies that payment is to be demanded of the drawees. The person who takes it receives it on that condition. It is not a direct promise to pay by the drawer, as by the maker of a promissory note; but the drawer undertakes that the drawee shall accept and pay, and is answerable only in case of his failure. It is accordingly considered not as due from him until such demand be made and the drawer refuse payment.

The cases on this subject, it is true, relate to checks drawn on private bankers; but I see no difference in principle between the case of an individual banker and an associated corporation of bankers. The general reasons are the same, although the probability of a loss by the failure of the latter is more remote. On the evidence there may be a doubt whether the defendants had sufficient funds in the bank on that day for the payment of the draft. The want of funds may excuse the want of notice of non-payment, but it cannot be a reason to dispense with the demand of payment. The drawees, without funds, might have paid it for the honor of the drawers. A demand is still necessary, and it is after the dishonor of the draft only that the holder can require payment from the drawer. It is unnecessary in the present case to decide within what time such demand ought to be made, or what would be the effect of presenting the draft, even at this day. If such had been the case, other circumstances might have come into view, and present a question which it is not now material to examine. On the whole I am of opinion that a new trial ought to be granted

KENT, J. Checks are substantially the same as inland bills, and are negotiable like inland bills, payable to bearer: Chitty, 16, 17, 109. Lord Kenyon, in a late case, *Boem et al. v. Sterling et al.*, 7 T. R. 23, said he was satisfied there was no distinction between checks and bills; and in that case the check was declared on as a bill of exchange; and so it was also in the case of *Grant v. Vaughan*, 3 Burr. 1516; Bl. Rep. 485; in which it is called a cash or note bill. A check has all the requisites of a bill of exchange. Coming within the general rules of bills, the holder of the check in question was bound to prove a demand, or due diligence to get the money of the bank on whom the check was drawn. The bank was first to be resorted

to, and the drawers of the check were only to come in aid of the default of the bank. In the cases of *Grant v. Vaughan*, and *Boem et al.*, to which I have already alluded, the holders of the checks first demanded payment of the bankers on whom they were drawn, and then they resorted to the drawer. It seems to be admitted on all hands that a banker's check must be presented for payment within a reasonable time, otherwise the holder takes upon himself the risk of the banker's responsibility; and then says one of the cases, 1 Ld. Raym. 743, if a banker will not pay it, it will charge him who gave the note. This universal admission seems to be pretty decisive to show that it is the duty of the holder to present it for acceptance.

Goldsmiths' or bankers' notes to which checks have been likened are seldom now used, but have been superseded by the introduction of checks, which, on account of their being payable on demand, are considered as cash, and like bankers' checks are transferrable by delivery and are governed by the same laws and rules as bills of exchange. So long ago as the time of Lord Holt, 7 Ld. Raym. 145; 1 Salk. 132, Goldsmith's bills were held to be governed by the rules of bills of exchange, and if the money be demanded in a reasonable time and not paid, it will charge him who gave the bill. A check is not due until demanded, and even independent of authority; I consider this to be the import and nature of the agreement. The drawer undertakes specially that the money shall be paid by the person on whom the check is drawn, and the money is supposed to be appropriated for that purpose in the drawee's hands.

It would be unreasonable and contrary to the agreement for the holder, instead of resorting to the fund in the hands of the drawee, to make his demand promptly and in the first instance of the drawer himself. The drawer may not have the means of payment except from the fund pointed out, and that fund may be at a distance, and in the meantime his credit will suffer by drawing a check which he cannot instantly pay. He must not be understood as promising to pay except upon the default of the drawee, and as Holt, C. J., observes in the case of *Tussell v. Lewis*, 1 Ld. Raym. 743, if the payee does not like the check or that mode of payment, he ought to refuse it, but having accepted it, it is at his peril.

In the present case there is no such demand proved; nor is there anything so peculiar in this case as to take it out of the general rule. It cannot be considered as a check fraudulently drawn without effects in the hands of the banker. The pre-

sumption is, that the check would have been paid if diligently presented. At least there is not evidence sufficient to justify a resort to the drawer, without having made the experiment.

On the ground, therefore, of a want of proof of a demand at the bank, I am of opinion the evidence did not warrant the verdict, and that it ought to be set aside, with costs to abide the event, it having arose from the misdirection of the judge.

Lewis, C. J., dissented.

PATRICK v. LUDLOW.

[3 JOHNSON'S CASES, 10.]

CONSTRUCTION OF WORDS "AT AND FROM" IN POLICY. — The words "at and from" in a policy on goods, means from the time the goods are laden on board the vessel; but applied to a ship, they mean the period of her stay in the port from the time of her arrival.

DEVIATION.—The master of a vessel received information that French privateers were cruising in the windward passage, and in the usual route from Surinam, he, therefore, determined to take the leeward passage, and touched at Demarara to take the protection of a British convoy then about to sail; but a few hours after his arrival there, the vessel was driven to sea in a gale of wind and afterward continued her voyage without convoy, and was captured by a French privateer. This was held not to be a deviation, as the master had acted *bona fide*, and with the sole view of avoiding danger, and to seek the safest course home.

ACTION on a policy of insurance on goods, on board the schooner Sally, at and from Surinam to Fredericksburg, in Virginia, beginning the adventure from the lading of the goods on board at Surinam. The policy was dated the twenty-seventh September, 1799. The cause was tried at the New York sittings in June, 1801, before Lewis, J. On the twenty-sixth August, 1799, the schooner sailed from Surinam on the voyage insured. About five days before she sailed, the master was informed by a Danish captain, that on his passage from St. Thomas, he had met with French privateers, and the master of the Sally, accordingly, thinking it would be unsafe to go to windward, as that would lead him in the track of the privateers, and hearing that there was an English convoy about to sail from Demarara, thought it advisable to get under its protection, and so determined to touch at Demarara. On the twenty-ninth of August the Sally arrived at Demarara. About four hours after, she parted her best bower cable, in a violent squall of wind, and was forced to sea without waiting for the convoy.

On the third September, she was captured by a French privateer and carried into Guadaloupe, where the vessel and cargo were condemned. The route the Sally took homeward, and which the convoy would also have pursued, to wit: the leeward passage, and through the sail rock passage, was a route very frequently taken by American masters on their return from Surinam to the United States.

It appears, that the schooner left Fredricksburg in April, 1799, and arrived at Surinam in June. The master finding the markets low at Surinam, went, by direction of the supercargo, to Demarara, where the supercargo died, having sold the greater part of the cargo. The master received payment for the cargo in specie, and returned to Surinam to obtain a homeward cargo. The schooner continued at Surinam until the twenty-ninth August, when she sailed on her homeward voyage, as above mentioned. About two days before the schooner left Demarara, there was a British sloop of war cruising off the coast, and sailed from thence with the few vessels there to join a convoy at Martinique, for England. The master of the Sally did not know whether there was any armed vessel at Demarara when he arrived there the second time, to serve as convoy. He intended to wait to be informed by boats, without going up the river. There was no public notice at Surinam of any convoy being at Demarara when the Sally left Surinam. The only information the master had was from the captain of a British schooner from Martinique. There was a British fleet at Surinam when the Sally left it, but no British merchantmen, except such as came with troops.

To this evidence, on the part of the plaintiff, there was a demurrer; and the question was, whether, in judgment of law, it was sufficient to entitle the plaintiff to recover.

B. Livingston, for the plaintiff.

Pendleton and Harison, for the defendant.

RADCLIFF, J. Two points are insisted on by the defendant: 1. That the policy commencing at and from Surinam reaches back to the first arrival of the schooner there, and attached before the intermediate voyage, which was manifestly a deviation, and that, therefore, the policy was discharged; 2. Admitting that the policy did not attach till the last departure of the schooner from Surinam, the voyage in the leeward, and particularly the touching and stay at the port of Demarara were also deviations, and discharged the policy.

1. The first objection would only apply to a policy on the ship. A policy on goods for any voyage, from the nature of the subject, cannot attach till they leave the shore to be laden on board. The risk on goods, according to the form of our policies, usually commences from the loading on board. In this instance the language of the policy, in one respect, is double. The insurance is expressed to be at and from Surinam; and yet, as in other policies, describes the adventure to begin from and immediately following the loading thereof on board. It, however, manifestly cannot apply to the period during which the intermediate voyage, with the outward bound cargo to Demarara, was performed. That voyage cannot, therefore, constitute a deviation;

2. It remains to be considered whether the route to the leeward, or the touching and stay at the port of Demarara, will amount to a deviation. In determining on a demurrer to evidence, it was rightly admitted that the evidence and its legal results must be received as true. From the testimony in this case there is nothing to impeach the motives of the captain. He appears to have acted *bona fide*, and for the security of all concerned. It is well known that these seas were infested with privateers at the time. The captain was informed by the master of a Danish vessel, immediately from St. Thomas, that he had been twice boarded by French privateers, in the windward passage, and saw them in possession of two American vessels. This information induced the master to take the leeward passage, which it is proved is very frequently taken by American vessels, and at certain times is necessarily taken. The resolution to take this passage, if not at all times proper, was, I think, under those circumstances, justifiable, to avoid danger, and ought not to be deemed a deviation.

As to the touching and stay at Demarara, for the purpose of convoy, I think it also justifiable upon the evidence, if the captain had that object and no other in view. It is no deviation to depart from the usual course of a voyage, to meet with convoy, in case of real danger, or to seek the safest way home. If this position wanted authority it is supported by Lord Mansfield, in the case of *Enderby v. Fletcher*, Park, 309 or 410, 6th ed. The inquiry in such cases, therefore, ought to be whether the captain acted *bona fide* and on reasonable grounds. In this instance he did not know of there being a convoy at Demarara, but he was informed by the captain of a British schooner from Martinique, who came down with the British fleet which took Surinam, and a brig

had actually gone to Demarara for convoy. It further appears that the expected convoy was to pursue the route intended by the captain. On this evidence, and considering the relative situation of Demarara, I think there was reasonable cause to stop there to look for convoy, and sufficient ground for the jury to believe that in doing this the captain acted with good faith and *ex justa causa*. If the jury would be authorized to make this conclusion we must consider it as admitted by the demurrer, and, of course, there ought to be judgment for the plaintiff.

KENT, J. The loss in this case was considered as sufficiently established by the capture. The only question is, whether the defendant was not discharged by reason of a deviation, arising, first, from going to Demarara, by direction of the supercargo, to sell the outward cargo; and, secondly, from going there on the return voyage to seek for convoy.

1. The first charge of deviation is of no avail, because the policy had not then attached. The policy was on the homeward cargo, beginning from the lading of the goods on board, at Surinam. As soon as the goods were on board the policy attached, as well while the vessel was at as on her return from Surinam. But we cannot intend from the proofs that the homeward cargo was laden on board until the return of the vessel from her first visit to Demarara, for she went there to sell her cargo, and the greater part was sold there, and the proceeds thereof received in cash, when she returned to Surinam to obtain a homeward cargo.

The true rule on this subject is that at and from, when applied to a ship, includes the period of her stay in the port from the time of her arrival there. But at and from, when applied to goods, means from the time those goods are put on board the vessel;

2. With respect to the other charges of deviation, the question is, was the going to Demarara to seek for convoy a departure, without necessity or any reasonable cause, from the regular and usual course of the voyage insured? It is in proof that the master had reason to fear he should meet with French privateers if he pursued the windward passage home, and that the leeward passage, which he took, was very frequently adopted by American vessels, on their return from Surinam, and in particular situations of winds and currents, was necessarily taken. So far, I think, the jury might well have inferred that taking the leeward passage was no deviation. The touching at Demarara, which must be considered a small deviation from the regular

course, was for the purpose of seeking the protection of an English convoy, as the master had heard from the captain of a British schooner from Martinique that such a convoy was about sailing from Demarara. A deviation, if done to avoid an enemy or to seek for a convoy, is justifiable.

It is no deviation to go out of the way to avoid danger. It is in every such case a matter of fact whether the captain acted fairly and *bona fide*, according to the best of his judgment, and had no other motive or view but to come the safest way home, or to seek for convoy. I think the testimony offered led to this conclusion, and that the jury might well have made it from the testimony; and on demurrer to evidence, every such conclusion is to be admitted.

I am of opinion, therefore, that judgment ought to be given for the plaintiff for the damages assessed.

LEWIS, C. J., was of the same opinion.

Judgment for the plaintiff.

In *Kemble v. Borne*, 1 Caines, 75, an action was brought on a policy expressed to be "at and from Point Petre, Guadaloupe, to Saint Thomas, beginning the adventure at and from Guadaloupe, and to continue until her arrival at St. Thomas, and there safely moored." It was held that "at and from" mean the day on which she is mentioned to be there, and the policy takes effect from that time. To the same point *Smith v. Steinbach*, 2 Caines, 158. A vessel, cargo and freight, being insured "at and from" a foreign port, the vessel sailed thence was found leaky, put back, was repaired and sailed again. It was held that the insurer was liable while the vessel was in port, after her return to port, and for the subsequent voyage: *Taylor v. Lowell*, 3 Mass. 331; *Merchants' Ins. Co. v. Clapp*, 11 Pick. 56.

In the case of *Garrigues v. Coxe*, 1 Binn. 592 (*post* —), the words "at and from Cape St. Francois," in a policy on a ship, were held to import that the risk attached "after she had been moored safely twenty-four hours at that port." In *Motteux v. London Ass. Co.*, 1 Atk., Lord Hardwicke held that the words "at and from Bengal to England," included the first arrival of the vessel at Bengal.

JONES v. CASWELL.

[3 JOHNSON'S CASES, 29.]

CONTRACT VOID AS AGAINST PUBLIC POLICY.—The land of A. was advertised for sale, on an execution in favor of B. C., who had purchased the land subsequent to the judgment, without knowledge of such judgment, agreed with B. at the sale that if he would not bid against him, he would pay him the amount of his execution, and give him his note for the further sum of one hundred and fifty dollars, and B. agreed to these terms, and did not bid at the sale. In an action on

the note against C. by the second indorsee, to whom it was transferred after maturity, and with a knowledge of the circumstances under which it was given, it was held that the consideration of the note might be inquired into; and the consideration being in this case unconscientious, and against public policy, the note was void.

ACTION on seven promissory notes made by defendant and one Noble, payable on the first October, 1798, to John Ward or order, and bearing date March 9, 1798. Ward indorsed the notes in blank.

The case was tried at the Herkimer circuit before RADCLIFF, J. It appeared that Samuel Jones, the father of the plaintiff, had obtained judgment and execution against one Egleston, whose lands were advertised for sale in March, 1798. The lands had been previously sold for a valuable consideration by Egleston to the defendant and Noble, but subsequently to the judgment, and without knowledge of it by them. Jones attended at the time of the proposed sale, and the defendant and Noble, in order to secure themselves, entered into negotiation with Jones, and to induce him to desist from bidding against them, offered to pay him the amount of the execution, and the further sum of one hundred and fifty dollars, the amount of the notes in question. The terms were accepted, and Jones said at the time that he had a further debt against Egleston, and had been at considerable trouble and expense in obtaining the judgment. Jones did not bid, and the defendant and Noble purchased the land at the sale for the amount of the execution, which they paid to Jones, and for the further sum of one hundred and fifty dollars. John Ward, by agreement of the parties, gave his note to Jones, and the defendant and Noble gave the present notes to Ward as a counter-security to him. In April, 1798, Ward indorsed the present notes to Jones in blank, and the latter gave up Ward's notes in exchange. In May, 1799, the plaintiff obtained the notes from Jones, his father, knowing the consideration for which they were given, and the circumstances under which they were obtained.

The question reserved upon these facts was, whether the consideration of the notes was valid, and the plaintiff entitled to recover.

Griswold, for the plaintiff.

Gold, for the defendant.

RADCLIFF, J. In this case several questions have been raised: 1. Whether there existed any consideration for the notes on which the action is brought, or whether the contract was a

nudum pactum; 2. Whether the consideration was lawful; 3. Whether, if lawful in itself, an undue advantage was not taken of the defendant's situation, and the demand, therefore, unconscientious.

If any one of these points be decided in favor of the defendant, there is no doubt but the plaintiff ought to be affected by it; for Ward, the person to whom the notes were originally given, was a nominal party only. Samuel Jones, the father of the plaintiff, was the real party; and the notes were received by the plaintiff from him when they were overdue, and with full notice of the consideration and the circumstances under which they were given. The plaintiff is, therefore, to be deemed as standing in the same light with the original payee of the notes.

As to the first question, I think the contract was not void, merely for the want of consideration. It is not essential that the consideration should import a certain gain or loss to either party. It is sufficient if the party in whose favor the contract is made, foregoes some advantage or benefit, or parts with a right which he might otherwise exert: *Pow. on Cont.* 344; 3 *Burr.* 1672. In the present case, Jones, the judgment creditor, had a right, in common with others, to bid at the intended sale of the property, and his bidding might probably have had a considerable influence on the sale. He agreed to relinquish this right, in consideration of the money secured by the notes. This was, at least, a principal part of the consideration, and, if not illegal, was sufficient to support the contract.

Whether the consideration was legal, is a question of considerable moment. It is important that sales at auction, and particularly on legal process, should be conducted with good faith, and without prejudice to any party. The forbearance of bidding was the leading, and in reality the only consideration. It is true, Jones said he had a further debt against Egleston, and had been at considerable expense in obtaining this judgment. But those were not the claims for which the notes were given, and they were no incumbrance on the real estate of Egleston. If the defendant and Noble had sought relief in equity, they would have been entitled to a discharge, or an assignment of the judgment, on paying its amount; and Jones could not have attacked these demands. The notes being no claim on the property in the hands of the defendant and Noble, if they were extorted from them at the moment of the sale, it was an undue advantage taken of their situation, and ought not to succeed. The forbearance of bidding was, therefore, the real considera-

tion, and I think it a consideration which ought not to be sanctioned in a court of justice. The law has regulated sales on execution with a jealous care, and enjoined such proceedings as are likely to promote a fair competition. A combination to prevent such competition is contrary to morality and sound policy. It operates as a fraud upon the debtor and his remaining creditors, by depriving the former of the opportunity which he ought to possess, of obtaining a full equivalent for the property which is devoted to the payment of his debts, and opens the door for oppressive speculation. On a similar principle, the bidding of puffers at auction, to enhance the price for the benefit of sellers, has been adjudged, in the English courts, a fraud on real bidders, and the purchaser not held by his bid: Cowp. 895; 6 T. R. 542. An attempt to silence bidders cannot be viewed in a more favorable light.

I am, therefore, of opinion, that the consideration of the notes was illegal and void, and that judgment of nonsuit ought to be entered.

KENT, J. As the notes were indorsed by Ward to Jones, with full knowledge in Jones, of the circumstances under which they were given, he having been the principal in the negotiation, and as the notes were indorsed by Jones to his son, after they were due, and with full knowledge also in the son, of the original negotiation, I consider the merits of the case between the parties the same as if the suit was in the name of the original payee. The defendant is entitled to go into the consideration of the notes. And, upon facts stated, I am of opinion that the notes were given without valid consideration. All that Samuel Jones could, or ought to have demanded, in consequence of his execution, was the amount of his judgment. That was paid him by the defendant, and to demand the further sum of one hundred and fifty dollars, for desisting from bidding at the sale, was an unconscientious demand. It was a consideration against public policy, which encourages bidding at sales on execution. This was the language of the old law, 8 Co. 97 a, and the same policy is pursued in our statute, which directs how long and in how many places notice of such sales shall be given by the sheriff. The defendants were at the auction, struggling, as innocent purchasers, to protect themselves from loss; and advantage was probably taken of their fears and their anxiety to preserve the estate. The suggestions of Jones, that he had a further debt against Eggleston, and had been at trouble and expense in obtaining the judgment, do not appear to have formed any part

of the consideration of the notes. They appear to have been thrown out, after the negotiation had been completed and the contract made. We cannot take them to be anything more than mere suggestions, as they have not been supported by proof.

The notes, therefore, resting wholly on the consideration that the plaintiff's father should desist from bidding at the sale, I think the consideration must be adjudged void, as against public policy and the interests of the original debtor, whose property is liable to be sacrificed by such combinations.

I am of opinion that judgment of nonsuit must be entered, according to the stipulation in the case.

LEWIS, C. J., was of the same opinion.

Judgment of nonsuit.

The rule of law is well established that any agreement whereby bidding is checked or stifled at an auction or a sale is void, and no action can be maintained on such agreement: *Thomson v. Davies*, 13 Johns. 112; *Doolin v. Ward*, 6 Id. 194; *Gardiner v. Morse*, 25 Me. 140; *Hook v. Turner*, 22 Mo. 333; *Gulick v. Bailey*, 5 Halst. 87; *Mills v. Mills*, 40 N. Y. 546; *Swan v. Chorpenning*, 20 Cal. 182; 1 Story on Cont. sec. 677. In *Atcheson v. Mallon*, 43 N. Y., a board of auditors of a town were authorized to receive sealed proposals for the collection of the taxes to be assessed in the town, and to award the collection of the taxes to the person who would propose to collect the same on terms most favorable to the town. An agreement was made between two persons, each sending in distinct sealed proposals, that if the collection should be awarded to either, both should share equally in the profits, or contribute equally to the losses. It was held this agreement was against public policy and void, and that any agreement between parties designing to make bids, tending either directly or indirectly, to restrain and lessen rivalry and competition between them, is void as against public policy, even although it may not appear that such agreement did really produce any result detrimental to the public interest.

But there is nothing illegal in two or more persons agreeing together to purchase property at a sheriff's sale, and fixing a certain price which they are willing to give, and appointing one of their number to be the bidder: *Smull v. Jones*, 6 Watts & S. 122. So it is held in *James v. Fulcrod*, 5 Tex. 512, that an agreement, among several, to stifle competition at a public sale, with a design of purchasing property at less than its fair value, is against public policy and void; but persons may unite in any number that may be necessary to make the purchase advantageous to themselves, provided this junction of interests be without "dishonest motives," or injurious consequences. The limit of the general rule is well stated in *Phippen v. Stickney*, 3 Met. 388, the court saying: "The extent to which the doctrine of invalidating such contracts can safely be carried would rather seem to include within the rule all cases of fraudulent acts and combinations having for their object to stifle fair competition at the biddings with the design of becoming the purchasers at a price less than the fair value of the property. Beyond this the application of the principle contended for may be found productive

of mischief, and an unwarranted interference with the course of business at auction sales." A late case in Ohio indorses this doctrine, and dissents from the decision of *Atcheson v. Mallon*, *supra*, in New York. It was this: A contract for making a public improvement was about to be let to the lowest and best bidder. A., who had filed his bid, and B. who was about to file his bid, entered into an agreement to become partners in the execution of the work, should the contract be awarded to either of them, and further agreed that the contract so awarded should inure to the benefit of the firm. This agreement was not intended to influence the bid of either party. B., to whom the work was awarded, refused to perform the work in partnership with A., and assigned the contract for the work to a stranger for a valuable consideration, which he received. It was held that the agreement was not void as against public policy; it not appearing that the intent, effect, or necessary tendency of the contract was to stifle fair competition at the letting: *Breslin v. Brown*, 24 Ohio St. 565.

ABBOTT v. SEBOR.

[3 JOHNSON'S CASES, 39.]

INSURANCE ON PROFITS.—A policy on profits on goods is a valid policy, and the insured may recover a total or an average loss, according as the loss of the goods is total or partial.

RULE AS TO TOTAL OR PARTIAL LOSS.—It seems that the proper rule to ascertain whether there is a total or partial loss of profits, is to determine whether more or less than one-half in value of the subject has been lost.

RECOVERY FOR A PARTIAL LOSS ONLY.—Where the assured, after an abandonment, affirmed a purchase of the ship by the master for the benefit of the assured, it is a waiver of the abandonment and the assured is entitled to recover for a partial loss only.

ADMIRALTY SURVEYS AS EVIDENCE.—Admiralty surveys as to the unseaworthiness of vessels are not evidence of the facts stated in them, as a party would thereby be concluded by the testimony of persons whom he had no opportunity to cross-examine.

Action on a policy of insurance on profits of goods on board the ship *Mary*, from Batavia to New York, touching at the usual places for supplies. The policy was dated twenty-third November, 1798, and the goods valued at twelve thousand dollars on profits. Unless in case of general average, no loss was to be paid under five per cent.

Plaintiff, at the trial, proved the policy and an interest of one-eighth in the cargo, and that an abandonment was made on the fifth of April, 1799. The testimony of the captain showed that on account of irreparable damage sustained by the vessel from storms, leakage and other causes, he was obliged to put into St. Kitts on the seventh of January, 1799, where the cargo

was stowed, because after two surveys the ship was condemned as not worth repairing. The ship and cargo were there sold at auction under the direction of the supercargo, William S. Robinson, who was a part owner of the ship and cargo, and who purchased the ship at the sale, on account of the owners, for forty-seven hundred dollars. Being repaired at St. Kitts, she was afterward able to make the voyage and take a light cargo to New York. It was shown that by the laws of St. Kitts, that unless the ship had been previously condemned as unfit for sailing, the cargo could not have been sold there; and further, that after the cargo was landed it could not be exported in any other ship than the one that brought it. The captain, the supercargo, and the carpenter of the ship each testified to the serious nature of the damage sustained by the vessel before putting into St. Kitts, and the impossibility of taking her in that condition with the cargo to New York.

On the part of the defendant, it was proved by one of the wardens of the port of New York, that he with others surveyed the ship on her arrival, and that he thought her sufficient to have brought her cargo of coffee and sugar to New York. The deposition of the warden and three other experienced persons stated particularly the survey made at New York, the sixteenth day of May, 1799, and their testimony showed that it was possible for the ship to take her cargo to New York.

The deposition of the supercargo, taken in New York, November 25, 1800, though objected to, was read in evidence. He confirmed the captain's testimony as to the voyage, damage, surveys, etc. He further stated that the cargo was so damaged that it was prudent to sell it at St. Kitts; that the sale was open and fair; that he purchased on account of the owners, for four thousand seven hundred dollars, the repairs costing seven hundred and fifty dollars; that the St. Kitts cargo was purchased with part of the proceeds of the Batavia cargo.

The judge, in his charge to the jury, said he considered the policy in the light of a wager; that the plaintiff was entitled to recover unless there was an absolute loss of the subject. There could be no average; it must be a total loss or nothing. That on an abandonment, the insurer on the goods, not the insurer on the profits, would be entitled to the amount of the sales at St. Kitts; that if the captain acted *bona fide* and for the best interest of those concerned, the plaintiff ought to recover.

A verdict was accordingly found for the plaintiff, as for a total loss.

Pendleton and Harison, for the defendants.

Troup and Hamilton, for the plaintiffs.

KENT, J. A motion is made, on the part of the defendants, for a new trial, on the following grounds:

1. That the plaintiff could not recover without a total destruction of the subject from which freight was to arise; 2. That if it was to be considered as an interest policy, the plaintiff ought only to recover an average loss.

1. A policy on profits is a valid policy. The point has never been directly decided by this court, and it may, therefore, not be improper to bestow a few observations upon it. In the case of *Loomis & Tillinghast v. Shaw*, 2 Johns. Cas. 86, which was a policy on profits, the only point submitted was how much the plaintiff ought to recover. The court decided that, admitting the plaintiffs were entitled to recover, they were entitled to an average of three-eighths only. In the case of *The United Insurance Company v. Lenox*, 1 Johns. Cas. 877, the court seemed to consider it as a point granted, that freights, which is the expected profit on a ship, and, therefore, extremely analogous to profits arising from any other subject, was insurable.

The English law appears to be settled. In the case of *Grant v. Parkinson*, Park. 267; Millar, 261, which was an insurance on profits to arise on a cargo of molasses, Lord Mansfield, at the trial, and the court of K. B. afterward, on a motion to set aside the verdict, held that the plaintiff had an insurable interest, and the policy was not to be considered in the light of wages. This doctrine received more decisive confirmation in the case of *Le Grafts v. Hughes*, Park. 259; Millar, 226, in which it was held that profits which one had reason to expect from a subject in possession, was an insurable interest. The case of *Crawford and others v. Hunter*, 3 T. R. 13, settled the question in a still more formal and explicit manner.

These insurances on freight, on profits, on commissions, etc, are said to be founded on the course and interests of trade, and are greatly conducive to its prosperity. The doctrine, however, that runs through all the case is, that the assured must have an interest in the subject-matter, from which the profits are to proceed, in order to prevent the policy from being considered a wager. I do not mean to be understood that a policy without interest is not valid at common law. One of the cases I have cited is pretty conclusive to prove that wager policies

were valid before the statute of George II. This, however, is not the point before us. Policies on profits or freight, if the assured be owner of the subject which is to create them, are not wagers, but policies on a real and substantial interest; and in this light we are to examine the policy in the present case;

2. The question then in this case is, whether the plaintiff is entitled to recover a total or an average loss only. The policy engages that the ship shall perform the voyage with the goods on board, and, if prevented by any of the enumerated perils, the plaintiff shall be indemnified for such a profit on the goods. What combination of facts will constitute a loss of the voyage, and justify the assured to abandon the thing insured, depends on the special circumstances of each particular case. In the present instance, they are considerably complex, and the testimony somewhat variant, and some parts of it susceptible of different conclusions. The ship, in the course of her voyage, was injured by the perils of the sea, and forced into St. Kitts. She there underwent two surveys, under the direction of the admiralty. The cargo was landed, and from the injury that both ship and cargo had received, the difficulty of repairing the ship, the impediments resulting from the laws of the place, and the results of the surveys, the captain considered the voyage as broken up, and acted accordingly. The ship was sold and purchased by the supercargo, who was part owner of the ship and cargo. He purchased her on behalf of the owners; and on her return to New York, the owners affirmed the purchase, and sold the ship for their own benefit. This was a waiver of any claim for a total loss on the ship. It is like the case of *Saidler & Craig v. Church*, decided in July term, 1799, in which it was held, that if the insured, after abandonment, affirm the purchase of the vessel by the captain, he waives his abandonment, and is entitled only to average loss, on the principle that *omnis rati habitio mandato aequiparatur*.

With respect to the cargo at St. Kitts, that was taken in on account of the owners, and the rum purchased with part of the proceeds of the East India cargo: The plaintiff, as part owner of the ship and cargo, approved in general of what the supercargo had done at St. Kitts; and the cargo brought to New York was divided among the several proprietors, according to their respective interests therein. I cannot perceive, however, that any act of the plaintiff is to be considered as a waiver of his claim for a total loss on the profits; and the question, in respect to the policy on profits, is whether the

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evidence will warrant a finding for a total or only an average loss. Considering this an interest policy, I think it follows that there may be an average loss. The court allowed one in the case I have cited of *Loomis & Tillinghast v. Shaw*. In this respect there was a misdirection of the jury. They were told there must be a total loss or nothing, and they found accordingly. What shall be the criterion of an average or a total loss in respect to profits, I cannot at present with clearness decide. Perhaps the established rule, in respect to ship and cargo, of a loss of more or less than half the subject in value may be applicable. If so, the question here will be whether the more profitable half of the cargo might not have been brought in the same ship to New York. I suggest this as a rule that may perhaps apply; but without giving any opinion upon it, I think the jury were misdirected, and the subject was not left to them in that latitude in which the law required. I am of opinion, therefore, that owing to this misdirection, to the complex nature of the case, its importance, its novelty, and the uncertainty whether justice has or has not really been done, there are sufficient reasons why this case should be re-examined by a jury. In a common case, I would let such a verdict rest. But this has peculiar claims to our interference, from the extent of the demand, and the novelty of some of the points discussed.

There was a question raised on the admissibility of the admiralty surveys, which it may be proper to notice. The question is not very important in the present instance, because the substance of the facts contained in those surveys was proved by witnesses. But as the question may arise again on the trial, I mean to be understood that I hold them inadmissible to prove the facts they recite. To admit them so far would contravene the established rules of legal evidence. A party would be concluded by the testimony of persons whom he had no opportunity to cross-examine. It is altogether *ex parte* evidence, and must be rejected. The testimony of the supercargo was also objected to, but I think his testimony competent, because he is not interested in the event of the suit. The verdict cannot be given in evidence against him.

My opinion, accordingly, is that a new trial ought to be awarded.

RADOLIFF, J., and LEWIS, C. J., were of the same opinion.

New trial granted, on payment of costs.

DUSENBURY v. ELLIS.

[3 JOHNSON'S CASES, 70.]

LIABILITY OF AGENT ON NEGOTIABLE PAPER. — A person signed a promissory note in the name of another, as the attorney of the latter, but having no authority from him for that purpose, he was held personally liable on the note to the party who had accepted it under such mistake or imposition.

CERTIORARI from a justice's court. Ellis sued Dusenbury before the justice on a promissory note for nineteen dollars and seventy-seven cents, given by Dusenbury to Levi Fish or order, and by him indorsed in blank. The note was signed by the defendant below, in the words following: "For Peter Sharpe, Gabriel Dusenbury, attorney." The note was otherwise in the usual form, and began with the words "I promise," etc. It was contended that the defendant was not liable, having signed the note merely as attorney for Sharpe, and he produced his letter of attorney, which, however, appeared to be nothing more than the power to collect debts, and contained no authority to give notes, or bind the principal in that way. The justice gave judgment for the plaintiff below.

Van Antwerp, for the plaintiff in error.

Emott, for the defendant.

By COURT. There can be no question but that Dusenbury signed the note without having any authority for that purpose. The letter of attorney could not bind the principal beyond the plain import of it. An authority to collect debts cannot by any possible construction be an authority to give notes.

The only question then is, whether Dusenbury was not personally responsible as for his own note. On this point we are of opinion that if a person under pretense of authority from another executes a note in his name he is bound; and the name of a person for whom he assumed to act will be rejected as surplusage. The party who accepts a note under such mistake or imposition, ought to have the same remedy against the attorney, who imposes on him, as he would have had against the pretended principal if he had been really bound.

Judgment affirmed.

While the doctrine of this case has been repeatedly affirmed in New York, it is not accepted generally. In two cases the court of appeals have referred to it, and given a construction to the decision. In *Walker v. Bank of New York*, 9 N. Y. 582, Selden, J., shows that the doctrine of the case

applies only where there is misrepresentation or imposition, and that it clearly does not extend where there is no mistake, misrepresentation or deception as to any matter of fact. In *White v. Madison*, 26 N. Y. 117, the same judge referred to the case as a leading one in that state on the liability of an agent who exceeds his authority. The case is cited in 1 Parsons on Con. 69, as holding a doctrine different from that established by the general current of authority in this country and in England. But taken with the modification the court of appeals in New York has given to it, the doctrine may be considered as sound. The latest reference of the court of appeals to this case is in *Dung v. Parker*, 52 N. Y. 499, where Andrewa, J., says: "The earlier cases in this state allowed the defendant to be charged in an action of *assumpsit* upon the contract treating the assumed agent as principal. The later decisions seem to regard the liability in the absence of fraud, as resting upon an implied warranty by the agent of his authority to make the contract into which he entered: *Dusenbury v. Ellis*, 3 Johns. Cas. 70; *Meech v. Smith*, 7 Wend. 315; *Palmer v. Stephens*, 1 Den. 480; *White v. Madison*, 26 N. Y. 118; *Collen v. Wright*, 8 E. & B. 647."

RIGGS v. DENNISTON.

[3 JOHNSON'S CASES, 198.]

LIBEL ON AN ATTORNEY — JUSTIFICATION.—To charge a counselor at law with offering himself as a witness, in order to divulge the secrets of his client, is libelous, and it is no justification that he disclosed matters communicated to him by his client which had no relation or pertinency to the cause in which he was engaged.

LIBEL ON A COMMISSIONER OF BANKRUPTCY — JUSTIFICATION.—To charge a commissioner of bankruptcy with being a misanthropist, a violent partisan, stripping the unfortunate debtors of every cent, and then depriving them of the benefit of the act, is libelous; and the defendant, to make out a justification of the charge, must show that the plaintiff as commissioner perverted the law to such oppressive purposes.

SECRETS, COUNSEL BOUND TO KEEP.—A client's secrets which a counsel is bound to keep are the communications and instructions of the client relative to the management or defense of his cause.

ACTION for libel. The case came before the court on demurrer to the pleas. The plaintiff's cause of complaint was based on charges made against him as a counselor at law and commissioner of bankruptcy. The libelous charges, of which the plaintiff particularly complained, were in reference to his position as commissioner of bankruptcy, that he was a misanthropist, a violent partisan, and that he defeated nearly one-third of all the unfortunate debtors that had been before him, first stripping them of every cent they had in the world, and then depriving them of the benefit of the act. And in reference to his position as counselor at law, that he had received a fee of fifty dollars as a counselor, and then offered himself as

a witness against his client, in order to divulge the secrets of his client. The defendant's pleas and the plaintiff's grounds of demurrer thereto sufficiently appear from the opinion of the court.

By Court, KENT, J. There can be no doubt but that the charges contained in the declaration are libelous and actionable. They were published of the plaintiff, in relation to his profession and office, and tended to injure and disgrace him. They charged him with a want of fidelity in his profession, and with partial and oppressive conduct as a commissioner. They were printed, and, consequently, had a wider circulation and more permanent existence. The only question, therefore, that can arise upon the record, is whether the pleas contain matter which amount in law to a justification of the libel.

One charge in the libel is, that the plaintiff had voluntarily offered to divulge the secrets intrusted to him by his client, contrary to his duty as counselor. The first plea (to which I now confine myself) states, by way of justification of this charge, that the plaintiff being employed by Nathaniel G. Ingraham in a certain cause, was informed by him, as a secret, that he (Ingraham) had concealed himself and left the city, to avoid being arrested in that cause; and that the plaintiff afterward divulged this secret to W. W. Woolsey, and again, at an inquest held before the district judge, offered himself as witness against his client, in order to divulge that secret. The fact of his having divulged this secret to Woolsey, I consider as irrelative and impertinent. The libel charges the plaintiff with a breach of trust and duty as counsel, in that he voluntarily offered himself as an evidence to divulge the secret. The disclosure to Woolsey was no answer whatever to the libel, nor does that disclosure appear to have been intended, nor could it in judgment of law have operated to the injury or prejudice of his client. The nature of the privilege of a counselor is, that he shall not disclose his client's secrets in any action. The law has an eye to the disclosure only as a witness, and the libel pointed only to such disclosure. I therefore lay the fact of that part of the disclosure out of view.

The other fact, that the plaintiff, at the inquest, offered himself as a witness, in order to divulge the secret, is objected to as insufficiently alleged, because it is not averred that he voluntarily offered himself, and whether voluntary or not was traversable. A voluntary offer is here to be understood, and the meaning of the allegation is certain to a common intent, which

is well enough in a plea. The plaintiff might have traversed the fact, and the defendant would have been bound, on the trial, to have shown the offer to have been voluntary, for that is the gist of this part of the libel, and the intendment of the plea. This allegation in the plea can have no other reasonable intendment. It is the language of the libel itself, which is admitted to mean a voluntary offer, and, according to the just observation of Lord Chief Justice De Grey, Cowp. 687, a man cannot defame in one sense, and defend himself in another.

But the fact which the plaintiff offered to divulge does not amount to a justification of the libel. What the law understands by secrets between the attorney and his client, are communications made, as instructions for conducting the cause, and not any extraneous or impertinent communications: 4 T. R. 432; and it does not appear that the fact in question had any pertinency to the merits of the cause in which the plaintiff was employed. Whether Ingraham had or had not concealed himself to avoid the process, could not be any matter of instruction in the defense. It had no relation to it, and was, as Lord Kenyon observes, 4 T. R. 432, a mere *gratis dictum*, which the plaintiff was under no obligation to keep secret, in his character as counsel. At any rate, it was incumbent on the defendant to have stated that the fact communicated had connection with the instructions for a defense, and so have given the plaintiff an opportunity to traverse that allegation. The plea, therefore, as far as it justifies the libel upon the plaintiff as a counselor, is bad.

Another part of the libel charges the plaintiff with having willfully and knowingly perverted the law while acting as commissioner of bankrupts, for illegal and oppressive purposes. The facts stated in the plea by way of justification of these charges are that the plaintiff, as commissioner, separately examined Napthali Judah, and required his answers, without giving him a reasonable time to make correct ones; that the plaintiff, without assigning any reason, refused to certify as commissioner in the cases of Napthali Judah and John Blagge; and that he examined, as commissioner, Judah, Blagge, and Ingraham, touching transactions that happened many years before the bankrupt act was passed, and because they could not answer, refused them their certificates. My opinion on these facts is that neither of them amounts in law to a justification, because neither of them imports with certainty, even to a common intent, that the plaintiff willfully perverted the law for

illegal and oppressive purposes. They may all be true, and yet consist with rectitude of intention.

The examination of Judah, in the absence of the other commissioners, may have been legal, for what appears to the contrary. If the bankrupt be in execution, or cannot be brought before the commissioners, which might have been the case here, any one of them may attend and take his discovery: Laws of U. S., vol. 5, p. 10; and what amounted to a reasonable time to give a correct answer was matter of opinion. There is nothing in this transaction that by a common intent implies, or that is averred to mean depravity of heart, and in that consisted the essence of the libel. The same remark applies, and with stronger force, to the other fact of withholding the certificates. The plea does not meet and justify the charges. It is substantially defective.

There are other charges in the libel which the plea has not attempted to answer or justify, and which charges were clearly libelous, because they threw contumely and odium upon the plaintiff in his character as commissioner. These charges represented him as a misanthropist, a violent partisan, as stripping unfortunate debtors of every cent, of being gratified in their distresses, etc. It is unnecessary at present to examine the question, whether the law will allow of a justification of such charges which do not fix upon the party any indictable offense. It is sufficient to observe that in respect to the pleas now in question, no justification is set up in answer to them, and as the plea does not, therefore, either by denying or justifying, meet the whole matter or *gravamen* contained in the court, it is for that reason also bad: 2 Vent. 193; Cro. Jac. 27; Cro. Eliz. 434.

I have confined myself hitherto to the first plea, but the second and third pleas being to the same effect, the same remarks will apply to them. The fourth plea contains only a general allegation that the words in the libel were true. If those charges in the libel, such as misanthropy, etc., to which no justification is set up, be capable of being justified (and on which point we give no opinion), this general allegation is sufficient, because such a character as the libel bestows upon the plaintiff is not formed by one specific act, but by habitual conduct. However, as to other parts of the libel the plea is too general and vague. It ought to have stated the precise facts which were to justify the charges, so that the plaintiff might have an opportunity of denying them.

Upon the whole, we are of opinion that all the pleas are bad, and that judgment ought to be for the plaintiff.

Judgment for the plaintiff.

WILKIE v. ROOSEVELT.

[8 JOHNSON'S CASES, 206.]

VERDICT AGAINST LAW—SETTING ASIDE VERDICT.—The defense of usury was made in an action on a promissory note; and the jury were instructed that the note was usurious, and therefore the verdict should be for the defendant. However, the jury found for the plaintiff, and the court set the verdict aside, and granted a new trial. On a second trial, on substantially the same evidence, and against the opinion of the court, a verdict was again given for the plaintiff. The court set aside the latter verdict, as against law, and granted a new trial.

PROMISSORY NOTE VOID FOR USURY.—If a promissory note is given for a usurious contract, it is absolutely void, even in the hands of an innocent holder, who has received it in the fair and regular course of trade, without knowledge of the usury.

ACTION of *assumpsit* on a promissory note made by Jacob Mark & Co. for one thousand three hundred and sixty-six dollars and sixty-six cents, payable to the defendant, or his order, ninety days from its date, third June, 1799, and indorsed to the plaintiff.

Upon the evidence in the case, the judge charged the jury that the note was usurious and void, and that the verdict should be given for the defendant; but contrary to these directions, the jury found for the plaintiff; and a new trial was granted. On the second trial, the jury again found for the plaintiff. Whereupon a second motion was made to set aside the verdict and for a new trial, upon a case containing substantially the same facts as appeared on the former trial, and which appear from the opinions in the present case.

Jones and Hamilton, for the defendant.

Colden and Hoffman, for the plaintiff.

THOMPSON, J. Two questions arising out of the above case present themselves for the consideration of this court: 1. Whether this note was given for a usurious consideration; 2. If so, whether the court ought again to interfere and grant a new trial.

Usury consists in extorting or taking a rate of interest for money beyond what is allowed by law. It is not necessary that

money should be actually advanced in order to constitute the offense of usury, but any pretense or contrivance whatever to gain more than legal interest, where it is the intent of the parties to contract for a loan, will make that contract usurious. It is admitted that the parties to this suit are innocent, and that Edward Wilkie paid a valuable consideration for the note. This, however, cannot affect the present question, for if this note was given upon a usurious contract, it is absolutely void, even in the hands of an innocent person, who may have taken it in a fair and regular course of trade without any notice of the usury. If the contract was usurious in its inception, no subsequent transactions will cure it; but if the original contract was not usurious, nothing done afterward could make it so. Taking these principles as settled, how stood the facts in this cause as applicable to them?

From the facts as stated in the case, there can be no doubt but the note in question is the same note which Mark & Co. executed, and which was indorsed by James I. Roosevelt, and delivered to Charles W. Goodrich. That being the case, the note was given for the sum of one thousand three hundred and sixty-six dollars and sixty-six cents, payable in ninety days. It appears evident, also, from the testimony of Goodrich and Mark, and from the account or memorandum that was kept of their money concerns, that Mark & Co. were credited only for the sum of one thousand two hundred and forty-four dollars on account of that note. There can be no doubt then that the interest or premium allowed in this transaction was one hundred and twenty-two dollars and sixty-six cents, which is a rate of interest far beyond what is allowed by law. These facts are strongly fortified by the circumstances that Mark & Co. were much in want of money, and that about the time when application was made for the money, and the note given, Goodrich told Mark the rate of interest would be higher than usual; and more than two per cent. per month was mentioned. If, therefore, these witnesses are to be credited, there cannot remain a doubt but that this was a usurious contract. The application to Goodrich was for the purpose of loaning some money to answer present exigencies, and the whole transaction shows that it was a borrowing and lending between Mark and Goodrich, and that the manner in which the business was conducted was for the purpose of concealment and to evade the statute. Proof of usury generally depends on circumstances, and where those circumstances are so strong as to produce absolute conviction in the

mind, they are certainly entitled to as much weight as direct and positive testimony. Although I consider Mark as an incompetent witness, yet his testimony must be taken into consideration in deciding the present question; for to reject it now would be depriving the party of an opportunity of proving the same facts by other witnesses, if in his power to do it.

I come now to the second point, to wit: whether this court ought to interfere and grant a new trial. The granting of new trials is a matter of sound discretion in the court under all the circumstances of the case. It is undoubtedly for the furtherance of justice that the powers of the court, the powers of the jury, should be confined within their proper limits. That the jury should be the triers of the fact, and the court the judges of the law. And although, after two verdicts, the court will proceed with the utmost caution and deliberation in granting another trial, yet when the verdict is against law there can be no question as to the right of this court again to interfere, and I think there can be but little doubt as to the duty of the court to exercise that right. I do not consider this as one of those cases where the rigorous execution of extreme legal justice is hardly reconcilable to conscience, and that on that ground the court ought not again to grant a new trial. If the statute against usury is an unconscientious defense, or the law impolitic, it is the province of the legislature to repeal it. But as long as it remains in force it is the indispensable duty of a court and jury to carry it into effect. And from an attentive examination of all the circumstances of this case, I cannot discover any plausible grounds the jury could have taken in giving their verdict consistent with the law arising from the facts. Considering, therefore, the verdict as both against law and evidence, I am of opinion that a new trial ought to be granted.

RADCLIFF, J. This is an application to set aside a second verdict obtained by the plaintiff on a note alleged to be usurious. The facts stated in the present case are substantially the same as appeared on the first trial, and on which a new trial was awarded. The witnesses are the same, except that Jacob Mark was examined on the second trial, instead of his clerk; and if there be any difference in the effect of their testimony, it is that Mark supports the other proof to establish the usury more fully than his clerk. On this, as on the former occasion, there is no doubt on the evidence as to the fact of usury. The proof is direct and incomplete; and if the principles heretofore adopted by the court in this cause and in the case of *Jones v. Hake*, 2

Johns. Cas. 60, be correct, there is no doubt of the fact of usury. There exists no contrariety of evidence on which the mind can balance. The charge of the judge at the last trial, as applied to the evidence, was also explicit in favor of the defendant, and I therefore think it unnecessary to express an opinion as to the other points suggested in it.

The only question is, whether in a case of usury, after two verdicts, where no opposite testimony appears, the verdict of the jury ought to prevail against the law and evidence. I consider it as a verdict against law as well as evidence, for where the facts are fully and satisfactorily proved, and no controversy exists respecting them, the decision upon them must be a decision of law as much as upon a special verdict. In setting aside the former verdict, and in the case of *Jones v. Hake*, we have already determined that the nature of this defense is not a reason for submitting implicitly to the verdict of a jury. Without expressing an opinion as to the expediency of the act in question, or as to the morality of the transaction, or of this defense, we have considered ourselves controlled by the statute, and not at liberty to say this is one of those cases of hardship and unconscientious defense, in which if a party has succeeded in obtaining the verdict of a jury, we will not interfere to disturb it. The legislature have considered the practice of usury as an evil; they have declared it unlawful and corrupt, and have anxiously provided every guard in their power against it. After this expression of their sense, I cannot think myself authorized to view it in a different light, or to permit a statute intended by them as an important regulation of public policy, to be evaded or controlled, on the idea that its provisions are unjust and unconscientious. I, therefore, consider this defense as standing on the same ground with any other arising on a question of property, and subject to the same rules; and I can see no cause for the apprehension, that to award another trial, under the circumstances of this case, would in any degree interfere with the privilege of trial by jury. I am inclined to respect that privilege as highly as any of its advocates, but to preserve that mode of trial in its purity, and to maintain the confidence which it ought to possess, it is necessary to direct it to its proper objects, and to restrain the license of juries, when they step out of their province and undertake to decide the law in opposition to the opinion of the court and to a positive statute. If this were not the case, judges, instead of being judges of law, would become mere chairmen of forms, or at best, advisers of juries, and the latter

would finally determine the law on every subject. The fluctuations and evils attending such a system would be incalculable, and could not be tolerated in any country. It is sufficient to say that such is not our system. As a court we are bound to administer justice, according to law, and when we see the law manifestly evaded, it is our duty to correct the evil. In the present case, there is no doubt of the facts. In contemplation of law they present a case of usury. Being clearly of this opinion, for the reasons given on setting aside the former verdict, I think this verdict ought not to prevail any more than the first.

On the trial, an objection was made to the competency of Mark, one of the witnesses, and who was one of the makers of the note, on the ground that he could not be admitted to impeach its validity in the hands of any other persons. This objection has been considered as valid in the case of *Winton v. Saidler* (since overruled), decided in the present term, and the witness must, therefore, now be considered as incompetent. But what he has said does not, in any degree, vary the merits of this cause. The testimony of Goodrich is full and complete on the subject, and he is not opposed by any other evidence. I am, therefore, of opinion there ought to be another trial.

KENT, J. This is the second application for a new trial in this cause. A verdict was formerly obtained for the plaintiff on testimony to the same effect as that contained in the present case, and a new trial was awarded, at the last January term, because the verdict was clearly against evidence. I was of opinion in that case, that Goodrich was to be considered the lender of the money, and that the evidence of usury, between him and the drawer of the note, was decisive and unequivocal. The testimony in the present instance, is certainly as strong as it was on the former occasion, and the question now is, whether there be any reasonable evidence at all in support of the verdict; or whether we are to consider the verdict as the result of the prejudice of the jury against the defense, and of their determination to resist it.

I admit that if Goodrich, when he passed the note to Peck, acted merely as agent of the drawers, and passed the note as belonging to them and not as his own property, there was no usury in the case; because it is stated that Peck settled with him for the amount of the note. But I do not conceive any reasonable color for such a construction. Goodrich states that he received the note to be discounted, and that the proceeds were to be applied in payment of money lent by him to the

drawers. Goodrich, therefore, received the note for his own use and benefit, and he passed it to Peck as his own property. The amount of it was settled between them. There is no intimation, no conduct, from which to infer that he acted as agent. In the account rendered by him to the drawers the note is charged by him to them, and they are credited with the proceeds of it. In fact, Goodrich charged them with an interest at the rate of about three and a half per cent. per month. The clear truth of the case is, that Goodrich took the note, as he states, in payment of money lent, and was to charge them with such an interest for the money advanced, by way of discount on the note, as his conscience should allow him to take, provided, however, that it was not to exceed such a rate of interest, for he says he was limited in the allowance of discount. I cannot avoid seeing and believing that this was a usurious transaction between Goodrich, as the lender, and Mark & Co., as borrowers of the money. The defendant who indorsed the note only lent his name by way of accommodation. The negotiation was directly and wholly between Goodrich and the drawers. If a case of such palpable usury as this is not within the act, or if a jury will not listen to a plea of usury supported like the present, there is an end to the statute. It had better be formally repealed, for it would be a dead letter. I am perfectly satisfied that if the jury had thought the defense a just and honorable one, they would not have hesitated in finding for the defendant; and shall we permit hostility to the law to triumph? On this question I have no hesitation; and thinking, as I do, that on the issue between the parties there is no ground at all for the verdict, and that it is a verdict absolutely against law, I am for granting a new trial: 4 Burr. 2108; 1 T. R. 170, 171.

I put out of view every consideration drawn from the hardship of the case; as that the plaintiff is an innocent holder, and the defense *summum jus* and contrary to good faith. This might and would deserve weight if the case was doubtful; if there was evidence on both sides; if we could believe that the jury deliberated with a steadfast and single eye to the credibility of the testimony, and the just conclusions to be drawn from it, and did not suffer the policy of the statute to mingle with their deliberations, and to influence their judgments. But if a statute be constitutional in its provisions, and clear and precise in its injunctions, the courts are bound to see it respected and obeyed. It is not for them to arrest its operation merely because they question its policy.

There is no ground to disbelieve the testimony of Goodrich, who discloses the whole transaction fully; and as to the identity of the note I cannot see any possible doubt.

I am for a new trial, and that without costs, as I consider this a verdict against law.

LEWIS, C. J., and LIVINGSTON, J., dissented.

New trial granted.

NOTE VOID FOR USURY.—While this case states the doctrine of the New York courts as to the invalidity of a note for a usurious consideration even in the hands of a *bona fide* holder, it is not generally followed. We cannot better state the two different views prevailing than is laid down in *Dickerman v. Day*, 31 Iowa, 444, S. C. 7 Am. Rep. 156, where cases sustaining each view are collected in the opinion of Miller, J. He says: "In respect to an accommodation note sold or negotiated at a greater rate of discount than legal interest, the authorities are not uniform; some of the cases holding that the purchaser of such note from the payee, being the first party paying anything for it, is therefore the first owner, and that as the payee before the sale of the note had not acquired a legal right to sue the accommodation maker, the purchaser must pay the full face of the note or the transaction will be usurious. That as between the maker and the payee the note is without consideration and void in the hands of the payee, and becomes valid only upon being negotiated to a *bona fide* purchaser, and hence a party who buys an accommodation note before it has been used for any business purpose, stands in the same situation in respect to the defense of usury as if he were the payee named therein, and this though he had no knowledge that the note was accommodation paper and supposing it to be business paper. The cases holding this view are as follows: *Aebey v. Rapelye*, 1 Hill, 10; *Holmes v. Williams*, 10 Paige, 326; *Jones v. Hake*, 2 Johns. Cas. 60; *Wilkie v. Roosevelt*, 3 Id. 206; *Munn v. Commission Co.*, 15 Johns. 44; *Powell v. Waters*, 17 Id. 176; *Cram v. Hendricks*, 7 Wend. 569; *Dowe v. Schutt*, 2 Denio, 621; *Dix v. Van Wyck*, 2 Hill, 522; *Holford v. Blatchford*, 2 Sand. Ch. 149; *Knights v. Putnam*, 3 Pick. 184; *Churchill v. Sutter*, 4 Mass. 156, 162; *Van Schaack v. Stafford*, 12 Pick. 565; *Sanerwein v. Brunner*, 1 Har. & G. 471; *Metcalfe v. Watkins*, 1 Porter, Ala. 57; *Cockey v. Forest*, 3 Gill. & J. 483; *Carlisle v. Hill*, 16 Ala. 398; *Williams v. Banks*, 11 Md. 198; *Corcoran v. Powers*, 6 Ohio St. 19; *Bossange v. Ross*, 29 Barb. 576; *Sylvester v. Swan*, 5 Allen, 134; *Whitten v. Hayden*, 7 Id. 407; *Catlin v. Gunther*, 11 N. Y. 368; *Clark v. Sisson*, 22 Id. 312. On the other hand the courts of many other of the states hold that the defense of usury cannot be set up against the purchaser of an accommodation note taken at a greater rate of discount than legal interest, unless such purchaser have knowledge of the character of the paper. The cases holding this view are the following: *Otto v. Durege*, 14 Wis. 571; *Whitworth v. Adams*, 5 Rand. 333; *Taylor v. Bruce*, Gilmer, Va. 42; *Jackson v. Fassett*, 33 Barb. 645; *Sherman v. Blackman*, 24 Ill. 347; *Byrne v. Grayson*, 15 La. An. 457; *Smith v. Beach*, 3 Day 268; *Middletown Bank v. Jerome*, 18 Conn. 448; *Humphrey v. Clark*, 27 Id. 381; *Gaul v. Willis*, 26 Pa. St. 257, 4 Am. L. Rev. 556; *Ramsey v. Clark*, 4 Humph. 244. In our opinion this latter view is more reasonable." In addition are these cases holding the latter view: *Conklin v. Underhill*, 4 Ill. 388; *Wing v. Dunn*, 23 Me. 128; *Veazie Bank v. Paulk*, 40 Id. 109; *Forbes v. Marsh*, 3 N. H. 119; *Creed v. Stevens*, 4 Whart. 223.

CONROY v. WARREN.

[3 JOHNSON'S CASES, 259.]

CONSIDERATION, WHEN TO BE PROVED.—The holder of a note, check or bill payable to bearer, need not prove a consideration, unless it is alleged that the possession has been obtained by fraud.

PRESENTMENT OF CHECK FOR PAYMENT.—A check was drawn in March, 1800, and was not presented until October following. The drawer, after the date of the check, had drawn large sums from the bank, and when the check was presented, payment was refused, because there was no money to meet it. It was held that the drawer was liable, notwithstanding the delay in making presentment, it not appearing that any damage had been sustained by the delay.

ACTION OF *assumpsit*. The declaration contained two counts; the first, upon a check drawn by the defendant upon the branch bank of the United States, in the city of New York, for one thousand dollars, payable to No. 912, or bearer, and bearing date twenty-eighth March, 1800; the second, for money had and received. It appeared that the check was presented at the bank twentieth October, 1800, but payment refused, on account of insufficiency of funds to the defendant's credit; that the check was not stamped. The defendant moved for a nonsuit, on the grounds: 1. That plaintiff had not shown that he was a *bona fide* holder for valuable consideration; 2. That the check was not stamped; 3. That presentment for payment had not been made in due time. These objections were overruled, and verdict found for the plaintiff, for the amount of the check and interest. A motion for a new trial was argued by:

Evertson, for the defendant;

Colden, for the plaintiff.

THOMPSON, J. As to the first objection, it is contended that in all cases where a check is made payable to the bearer, it is incumbent on the holder to prove, on the trial, that he paid a valuable consideration for it. This objection I think not well taken; although, generally speaking, simple contract debts are not considered of equal solemnity with specialties, and are not, perhaps, so necessarily importing a valuable consideration, and as not to be enforced without this proof. Yet, I take it to be well settled, that with respect to bills of exchange and promissory notes, they, in this respect, stand on the same footing with specialties, and, *prima facie*, import a consideration: Chitty, 9. This principle seems necessary, for the purpose of strengthening and facilitating that commercial intercourse which is carried on

through this species of paper. The reason of the rule is equally applicable, whether the bill or note be made payable to bearer or order; and I can see no good reason why it should not apply to bank checks: Chitty, 51. Where, however, the instrument is made payable to bearer, so that no indorsement is necessary in making a transfer, and there are any circumstances of suspicion attending the manner in which the holder became possessed of it, it is necessary he should show that he paid a valuable consideration, or that he came fairly by it. As, if it had appeared that the check had been lost, it would have been such a circumstance of suspicion as to impose on the holder the necessity of proving that he came to the possession *bona fide*; as in the case of *Grant v. Vaughan*, 3 Burr, 1516, cited by the defendant's counsel. No such circumstance of suspicion appears in the present case. But so far as anything on that subject is to be collected from the case, the check was at first given by the defendant to the plaintiff. If any inference, in this respect, unfavorable to the plaintiff's right to recover, is to be drawn from his delay in presenting the check for payment, it was at least a circumstance proper to be submitted to the jury, and for them to determine whether the plaintiff became possessed of the check fairly, and for a valuable consideration. In this point of view there is not a sufficient ground for a nonsuit.

As to the second objection, I think it is not necessary, by the act of congress, that checks should be stamped. The statute imposing those duties, in describing the instruments required to be stamped, says: "Any bonds, bills, single or penal, foreign or inland bills of exchange, promissory notes, or other notes for the security of money," etc. If a check is at all included, it must be under the latter general description, "other notes for the security of money." Checks are a species of paper so common and in such general use and circulation, that it is fairly to be presumed that if it had been the intention of the legislature to include them, they would have been described by their appropriate and universal name. A check is not, in common parlance and in mercantile language, a note for the security of money. It is a draft or order for the payment of money; and I believe it has never been contended that a mere order or request to pay money requires a stamp. In the English stamp act, checks, drafts and orders are particularly mentioned; and this, I think, affords a presumption that they were not intended to be included in the act of congress. So far as usage and practice will afford an exposition of the construction of the

statute, it will, I believe, be universally against the opinion that checks require a stamp. I think the statute ought not to be constructed to extend to instruments not coming clearly within it. I therefore consider this objection also insufficient.

The third objection that the check was not presented in due time, appears to me not to be without some weight. It is not easy to be solved why the check, which was dated the twenty-eight of March, 1800, was not presented for payment until the October following. What shall be considered a reasonable time within which a holder of a bill or check shall present it for payment, or whether it is within the province of the court or jury to determine that point, seems to have been a subject of much discussion in England: Chitty, 147. But the better opinion appears to be that it is a question for the determination of the court; and this must be decided in almost every instance by the particular circumstances of the case. The best general rule undoubtedly is that when a note or bill is either payable on demand, or where no time of payment is expressed, that it should be presented as soon as possible under all the circumstances. This rule is for the protection of the rights of the third person, who may actually be responsible; and in most, if not all, the cases in the books where the question as to the delay or laches of the holder had been brought under consideration, the suit was not against the party liable in the first instance, but against some one through whose hands the instrument has passed by negotiation in the course of business. In such case it is right and proper that the holder should show due diligence, as the drawer might otherwise sustain a loss by the holder's delay. It might perhaps, under these circumstances, be incumbent on the plaintiff to show that the defendant has sustained no damage by the delay. I think the circumstance of the defendant's having drawn from the bank large sums of money after the date of the check, affords an inference to that effect sufficient to throw the *onus probandi* of actual damages on the defendant. The defendant is here presumed to have received a full and valuable consideration for the check, and is in justice bound to pay it. He has withdrawn his funds from the bank. There is no evidence or circumstance to warrant an inference that he has sustained any damage by the delay. From aught that appears in the case, the check was originally given by the defendant to the plaintiff, and has never passed through any other hands, and no third person is injured by the delay. I am, therefore, of opinion that no rule or principle of law ap-

plicable to negotiable paper will be violated by giving judgment for the plaintiff, and that no new trial ought to be granted.

KENT, J. I am of opinion also that the motion ought to be denied: 1 *Hinton's case*, 2 Show. 247, in which Pemberton, Ch. J., ruled that the bearer of a bill, who sued in his own name, must prove a consideration, does not state whether the bill had been previously lost or stolen. It is a short and loose note of that decision, and as it literally stands it cannot be law. But in the case of *Grant v. Vaughan*, 3 Burr. 1516; 1 W. Bl. 485, the bill had been lost, and, therefore, when the court lay down the rule generally, that if the bearer sue, he must entitle himself to recover on a valid consideration, we must consider the rule as applying to the subject-matter then before the court, which was the case of a lost bill. The law is now understood to be that a bearer of a bill or note payable to bearer need not prove a consideration, unless he possesses it under suspicious circumstances: Chitty, 51. A note indorsed in blank, and one payable to bearer, are of the same nature. They both go by delivery, and possession proves property in both cases. If a question of *mala fides possessio* arises, that is a matter of fact to be raised by the defendant and submitted to the jury. This doctrine is so laid down by Lord Mansfield, in the case of *Peacock v. Rhodes*, Doug. 636, and it has been cited and sanctioned since: 2 Dallas, 146; (S. C. *Gorgerat v. McCarty*, 1 Am. Dec. 270.) In a case in this court, *Livingston v. Clinton*, decided in July term, 1799, the law was laid down to the same effect, that if a note be indorsed in blank, the court never inquires into the right of the plaintiff, whether he sues in his own right or as trustee. Any person in possession of the note may sue, and may in court, if necessary, fill up the blank and make it payable to himself. A decision to the like effect was in March, 1800, affirmed in the court of errors in the case of *Cooper v. Kerr*. In the case before us, there were no circumstances sufficient to raise a suspicion of a fraudulent possession by the plaintiff, or to repel the presumption of property arising from possession;

2. In the case of *Cruger v. Armstrong and Barnwall* (*ante* 126) I considered it as a settled rule, that a check must be presented for payment in a reasonable time, otherwise the holder takes upon himself the risk of the banker's responsibility; and that drawing a check was an appropriation of as much money as it amounted to in the hands of the bank. In the present case, the bank did not fail, but it was the act of the

defendant himself which defeated the payment of the check, by drawing out the money which, in good faith, was to be considered as appropriated for the payment of the check. There is, therefore, no reason or justice in the present case that the defendant should not pay because it was not presented at the bank between March and October. And although checks are now considered as substantially the same as inland bills, I know of no case which goes the length of exonerating the drawer, where the responsibility of the bank has remained good, and where he was himself the cause of the non-payment by withdrawing the money. And to allow the defendant to avail himself of the non-payment at the bank, would be to permit him to avail himself of his own fraud;

8. I do not consider the check as coming within the act of congress laying a duty on stamped paper. The act specifies only bonds, foreign or inland bills of exchange, promissory notes, or other notes for the security of money. The act is to be taken strictly, and none of these expressions will reach the case of checks, as they do not strictly and technically answer either of those descriptions; and it is a rule of construction, that when a statute, and more especially a statute with penalties for neglect, specifies particulars, all other particulars not enumerated are excluded. The contemporary and uniform exposition of this act has been, that it is not applicable to checks, and they are too frequent and notorious a species of paper to have been omitted by mistake. I am satisfied, therefore, upon all his points, that the defendant must take nothing by his motion.

LEWIS, C. J., and RADOLIFF and LIVINGSTON, JJ., concurred.

Judgment for plaintiff.

This case is cited as authority in *Halsted v. Lyon*, 2 McLean, 228, as to the necessity of proving a consideration; and in *Matter of Brown*, 2 Story, 513, as to presentment for payment being excused if no damage is sustained.

DENNIS v. CUMMINS.

[3 JOHNSON'S CASES, 297.]

PENALTY—LIQUIDATED DAMAGES.—A. and B. entered into a written agreement, by which A. agreed to convey to B. seven hundred acres of land, thereafter to be appraised, in part payment of a farm, valued at three thousand seven hundred and fifty dollars, which B. agreed to sell to A.; and it was covenanted that in case either party failed to perform,

the party failing "should forfeit and pay to the party who should fulfill the agreement, the sum of two thousand dollars as damages." It was held, according to the intention of the parties, as gathered from the whole agreement, that this sum should be considered as a penalty and not as liquidated damages.

ACTION of debt for two thousand dollars founded on an agreement for the exchange of certain lands; whereby the plaintiff agreed to convey to the defendant seven hundred acres of land in part payment for a farm valued at three thousand seven hundred and fifty dollars, which the defendant agreed to sell to the plaintiff. The agreement also contained the following covenant: "And it is further covenanted in and by the said agreement, by and between the said parties, that in case of failure to fulfill the aforesaid agreements or covenants, on the part of either of the said parties, that the party not fulfilling the said agreement shall forfeit and pay to the other party who shall fulfill the said agreement, the sum of two thousand dollars damages." And the question now submitted to the court was, whether that sum was to be considered in the nature of a penalty, or as damages liquidated and agreed to be recovered against the party in default.

The case was submitted without argument.

By Court, THOMPSON, J. I think this sum ought to be considered as a penalty, and not as liquidated damages. The real intention of the parties ought to be sought after, and carried into effect, where it can be discovered from the instrument itself. If recurrence be had to this agreement, it never can be presumed that the parties had the sum in view, as the measure of damages for the full value of the defendant's property, which was to be exchanged, was only three thousand seven hundred and fifty dollars, and the value of the plaintiff's considerably less. It would be a strange construction to suppose that the damages on a failure in fulfilling such a bargain should be two thousand dollars. It is true, that where it is clearly inferable, from the nature and terms of the contract, that the parties have estimated and liquidated the damages, and have inserted that sum as the amount to be paid in case of non-performance, the court would be bound so to consider it. The cases, however, in the books, 4 Burr. 2228; 2 T. R. 34, where penalties have been considered in the nature of liquidated damages, are either where it appears from the contract that the penalties have barely exceeded the damages sustained or where, from the nature and circumstances of the case, no rule for estimating the actual damages could

be adopted, or it was manifestly the intention of the parties that the sum inserted should be considered as a compensation, and not as a penalty. But those cases by no means compare with the present. This is a case of strict penalty, and for which there does not appear to be any equivalent to the other party. To consider this two thousand dollars as the measure of damages in the present case, would be excessive and unreasonable in the extreme. We are, therefore, of opinion that it must be viewed only in the nature of a penalty, and that the plaintiff ought to assign breaches under the statute, and assess the damages by a jury.

See the case of *Graham v. Bickham*, and note, 1 Am. Dec. 328, where this subject is fully examined.

SMITH v. WRIGHT.

[1 CARRER, 43.]

GOODS ON DECK, LIABILITY OF.—No contribution is allowed for goods shipped on deck, and which had been thrown overboard, nor is the owner of the vessel liable as a carrier for the value of such goods.

ACTION against the owners of a vessel, to recover the value of goods shipped on deck, which had been thrown overboard. At the trial it was admitted that the defendants were owners of the ship *Charlotte*; that the plaintiffs were owners of twelve bales of cotton laden on deck to be carried from New York to Liverpool; that they were to pay one-half as much for freight as was paid for goods carried in the hold; and that the cotton was thrown into the sea, during a storm for the preservation of the ship and residue of the cargo, both of which arrived in safety.

Several brokers, underwriters and merchants, all uniformly testified that goods on deck, if lost, are paid for by the underwriters, without contribution from the assurers of the vessel or other portions of the cargo; that they knew of no instance where contribution had been allowed under such circumstances; that for goods on deck the premium was higher and the freight was less than that which is paid for goods under deck; that less freight was paid for goods on deck because they are not considered as being at the risk of the owner of the vessel.

A verdict was found for the plaintiffs, by consent, subject to the opinion of the court, on a case stated, as to the law and admissibility of the preceding testimony.

By COURT. The plaintiffs shipped on half freight, on the deck of the defendants' vessel, twelve bales of cotton for Liverpool; which, for the preservation of ship and cargo, were in a storm thrown overboard; and the question is, are they entitled to average? It is conceded that in general they are not; that the shippers of goods under hatches, and the insurers on ship and cargo are not liable to contribution on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation. But it is insisted there is not the same ground of exemption for the shipowners, because such fact is to be presumed within their knowledge; and they are benefited by the extra freight. If this reasoning be correct, its effect would be to make the shipowners insurers of all goods laden on deck, without premium, and at half freight; which certainly would be the height of injustice. It is sufficient for our purpose that the usage has been against the allowance of average to goods placed on the deck of a vessel. This is proved to be the case, from the testimony of several insurance brokers and merchants of long standing among us; some of them carry it back as far as thirty years; a period, however, too short, it is said, to establish a usage. The true test of a commercial usage is its having existed a sufficient length of time to have become generally known, and to warrant a presumption that contracts are made in reference to it. This appears to be the case in the present instance. We are, therefore, of opinion that judgment be for the defendants.

Judgment for defendants.

This case is cited with approval in *Gillett v. Ellis*, 11 Ill. 579; and as authority in 2 Parsons on Cont. 202, 327, 541, and in 2 Kent. Com. 604.

In *Harris v. Moody*, 30 N. Y. 269, Davies, J., referring to the case, says: "*Smith v. Wright* was an action to recover the value of goods shipped on deck and ejected. It was proved in that case that goods on deck, if lost, are paid for by the underwriters on those goods, without contribution from the assurers of the vessel or other parts of the cargo, and one merchant testified that he once owned goods stowed on deck which were lost by jettison, and being uninsured, he claimed nothing from the owner of the vessel or other part of the cargo; that he conceived it to be the general understanding that for goods ejected from the deck no contribution is to be made by the owner of the vessel or of other goods. The court held that the owner was not entitled to general average as the shippers of goods under hatches, and the insurer on the ship and cargo were not liable to contribution on account of their presumed ignorance of any part of the cargo being placed in so perilous a situation. The point decided in the case was that the carrier was not liable for the loss of goods shipped on deck when thrown into the sea for the preservation of the ship and cargo."

The case is also cited in *McArthur v. Sears*, 21 Wend. 195, as to the

principal point decided; in *Allen v. Merchants' Bank*, 15 Id. 489, as to usage, and lately in *Rawson v. Holland*, 59 N. Y. 619, to the remark of the court that "it is the general rule that a local usage must be shown to have been known to a party before he will be held to be bound by it."

HENDERSON v. BROWN.

[1 CASES, 92.]

TRESPASS, WHEN WILL NOT LIE AGAINST OFFICER. — The theater of the plaintiff was assessed by the assessors under an act of congress, but erroneously as a dwelling-house; a tax collector executed a warrant of distress under such assessment. It was held that an action of trespass did not lie against him as a ministerial officer for executing such warrant.

TRESPASS for breaking and entering the plaintiff's close called the New Theater, and taking and carrying away three hundred and twenty-five dollars. Plea, not guilty, with an agreement that any of the facts which now appeared in the case reserved for the opinion of the court might be given in evidence with the same advantage as if specially pleaded.

It appeared that the defendant was a duly appointed tax collector under the act of congress, and was furnished with a list in which the theater was designated as the dwelling-house of John Hodgkinson, and taxed at three hundred and twenty-five dollars; that for non-payment thereof he entered and took the money in question; that the theater and appurtenances were not the dwelling of any one, although the theater itself was inserted in the list of dwelling-houses by the assessor, and no appeal had been made from that assessment; that had the theater been assessed in the land list the tax would have been much smaller. Upon the foregoing facts it was agreed that if the court should be of opinion there was sufficient to justify the entering and taking the distress, that judgment should be given for the defendant, otherwise for the plaintiff, with interest from the time the distress was made.

Hopkins, for the plaintiffs, contended that the entry was unlawful, as the property was not a dwelling-house, and should have been assessed in the land list, and a tax levied accordingly. That the remedy in such cases is trespass against the collector who distrains for the tax: *Harrison v. Bulcock*, 1 H. Bl. 68; *William v. Pritchard*, 4 T. R. 2; *Eddington v. Borman*, Id. 4; *Perchard v. Heywood*, 8 T. R. 468. He further contended that the redress by appeal to the principal assessor was not adequate:

1. As the assessor could not remove property from one list to another; 2. There might have been no error in the valuation, though the property had been wrongly listed; 3. Because the time for appealing was before the apportionment of the tax upon houses and lands, when plaintiffs did not know whether placing the theater upon the wrong list would work an injury or not.

Hamilton, for the defendant, contended that this court would not enter into an examination of the acts of mere ministerial officers under the general government; that the warrant, regular on its face, was a justification, the defendant not having willfully committed the trespass complained of; that the plaintiffs' remedy was by appeal to the principal assessor; and that, if the action of trespass could be maintained at all, it should have been brought against the assessors, and not against the collector.

THOMPSON, J. This was an action of trespass for making a distress as collector for a tax on the theater in New York, imposed under the act of congress. It is admitted on the part of the plaintiff that the theater cannot be considered as a dwelling-house, in the contemplation of law, and, of course, not taxable as such. But it is contended that the collector is justified by his warrant notwithstanding this, so that the plaintiff has no remedy against the officer.

Officers acting under process from superior authority, ought in all cases to be justified by their process, where that can be done consistent with the established principles of law, and the rights of parties. That the rule is not universal as it respects ministerial officers, I think well settled: *Hard. 480; Buller, 82.* The distinction that is laid down in 10 *Coke's Rep. 76*, is, that where the subject-matter of the suit is within the jurisdiction of the court, but the want of jurisdiction is as to person or place, unless the want of jurisdiction appears on the process to the officer who executes it, he is not a trespasser; but where the subject-matter is not within the jurisdiction of the court, there everything done is absolutely void; the officer is a trespasser. If the present case be tested by this rule, the collector must be considered as a wrong-doer. The theater was not taxable as a dwelling-house. All proceedings, then, to impose the tax or collect it, must have been without authority, and wholly void, being a subject not within the jurisdiction of the assessors. Unless the plaintiff has his remedy against the collector or the assessors, he is without redress in a court of justice, and we are

driven to say here is an injury without a remedy. Admitting the assessors were liable, still this will not, upon the principles decided in the above case, excuse the collector; all are trespassers. The distinction above taken with respect to ministerial officers justifying under process, appears to me analogous to the present case, and has been repeatedly recognized in the English courts, in actions of trespass against their commissioners and collectors of taxes. In the case from H. Bl. 72, *Harrison v. Bulcock*, the action was brought against the collector and commissioners jointly; and in the two cases cited from term reports, *William v. Pritchard*, *Perchard v. Heywood*, the action was against the collector only. No question was there raised with respect to the officer being justified by his warrant; the sole inquiry was whether the property, for the tax of which distress had been made, was taxable; conceding that unless it was, all the proceedings were void, and the officer a trespasser; and the property not being considered taxable, in the opinion of the court, judgment was given against the collector. So in the present case, the theater not being taxable as a dwelling-house, the subject-matter was not within the authority of the assessors, and the imposing the tax was illegal, void, and could not afford ground of justification to the collector.

I am, therefore, of opinion judgment ought to be for the plaintiff.

LIVINGSTON, J. Upon no principle ought the defendant to be liable. It is made his duty on the receipt of the list to collect the tax, if not paid by a limited time. It was not for a subordinate officer, who was concluded by the judgment of the assessors to question the propriety of the theater's being classed as a dwelling-house. Having acted under a competent authority, and paid the money over, why should he refund the plaintiffs out of his own pocket, and be left to the liberality of government for his indemnity? If a wrong has been committed, and they are disposed to correct it and do justice, it is as probable they will act on the petition of the party aggrieved by the assessment, as on that of the collector; while a collector, by being thus exposed, might be ruined by a denial to reimburse him, no other individual can be very extensively injured by a like refusal. In this case the assessors had jurisdiction over the subject, and their mistake in considering a theater as a dwelling-house must be regarded as an error in judgment, for which a collector ought not to be thus harassed. They might suppose that as a theater yielded a considerable

rent, it was reasonable that it should be subject to as large a tax as a dwelling-house. In the cases cited from 1 H. Bl. 68, and 8 T. R. 468, the proceedings were *coram non judice*. The only questions there related to the exemption of certain property altogether by the terms of the several acts of parliament. The officer's liability to refund was not made a point in the argument, but appears to have been submitted *sub silentio*; at any rate, these are recent cases, and not obligatory here. It is better, therefore, to sanction a rule suggested by the common sense and feelings of men, and which affords protection to every ministerial officer acting under persons clothed with proper authority, than to adopt the subtlety and refinement of certain modern decisions, which are calculated to deter inferior officers from a faithful and prompt discharge of their functions, or to expose them to much vexation and expense.

It is also much in favor of the collector that the plaintiffs neglected to appeal. This being a remedy provided by the act they ought not lightly to be permitted to elect another.

RADCLIFF, J. On the trial of this cause it appeared that the plaintiffs were owners of the new theater in the city of New York; that the same was assessed and valued as a dwelling-house, under the act of congress to provide for the valuation of lands and dwelling-houses, and the enumeration of slaves within the United States, and was taxed as such, in pursuance of the act to lay and collect a direct tax within the United States. The defendant was a collector, and for non-payment distrained in a regular manner for the tax, and justifies that he had a right so to do. As a theater merely it was conceded not to be a dwelling-house, within the intent of these acts of congress, and does not appear that it was ever occupied as such. The assessors, therefore, had no authority to assess it as a dwelling-house, and subject it to the tax on houses of that description; nor could the collector derive from their assessment, or from any warrant which he may have possessed, an authority to demand a tax which no one had a right to impose. The power of the assessors was special and limited, and ought to have been strictly pursued within the bounds prescribed by law, and it was incumbent on the collector to see that he acted within the scope of their authority and his own, and by exceeding it he became in the eye of the law a trespasser.

In England, the same rule prevails in regard to their officers of the revenue, and particularly in the analogous case of their land tax. The cases in the English books are uniform and de-

cisive on this point, and in none of them was there a doubt entertained whether the officer collecting the tax was liable. Their acts on the subject of the land tax are numerous, and bestow on commissioners, assessors and collectors, powers equally extensive with those conferred on the officers appointed under the Act of congress. They have also an appeal from the assessors to the commissioners, similar to that from our assessors; and in the case of *Harrison v. Bulcock et al*, reported in H. Blackstone, that appeal was made and dismissed, and the collector was still held equally liable. Indeed, I know of no cases more parallel in their circumstances, and more intimately connected in principle. The decisions on this subject are founded on the general rule of the common law that special powers are to be strictly observed, and that all ministerial officers concerned in the execution of them are bound to see that they are clothed with proper authority. If there be any hardship in the case, it has been experienced for ages in England, and it belongs to governments to indemnify its officers when acting with good faith. Individuals ought not to suffer, and they can have no other judicial remedy than the one now sought. I think it no answer to this reasoning to say that the assessors had power to assess this theater as land (which would subject it to a different tax), and that, therefore, they had authority over the subject-matter. Inferior officers are liable for an excessive exercise of power as well as a total want of it. If they step out of the limits assigned to them, they are equally trespassers. This is settled even in the case of magistrates executing a judicial trust; although they have jurisdiction over the process as well as the person and cause, they are liable if they exceed their authority. The extent of this doctrine is not only supported by the principles of the common law and a current of English decisions, but was adopted by this court in the case of *Percival v. Jones*, 1 Johns. Cas. 393, in which we gave judgment against a magistrate for exceeding his powers.

Whether by the just construction of the act of congress, it admitted of an appeal on the point in question to the principal assessor, I think immaterial. The omission to make that appeal, or if made, the decision of the principal assessor against it, would not alter the case or conclude the appellant. Such decisions would still depend on the discretion of a ministerial officer only, and unless such discretion is declared to be definitive, or the nature of the subject requires it to be so considered, I deem it a maxim from which we ought not to depart, that no one

shall be finally concluded in his rights, without an opportunity to be heard in a court of justice and the regular decision of a competent tribunal.

As to the question which concerns the jurisdiction of this court in civil cases, where the validity of an authority exercised under an act of the United States is drawn in controversy, I think it cannot originally be doubted. This is simply an action of trespass, and the pleadings are in the usual form. The question under the act of congress arises incidentally upon the evidence on the part of the defendant, and congress, by their act establishing the judicial courts of the United States, have expressly recognized the jurisdiction of the state courts, and provided a remedy by writ of returnable in the supreme court of the United States, in case the decisions of the state courts should contravene their laws.

I am, therefore, of opinion, that we possess jurisdiction; that there was no authority under the act of congress to impose or collect this tax, and that this action is maintainable against any officer who enforced it.

KENT, J. The question submitted is, whether the plaintiffs are entitled to recover upon the facts stated.

The act of congress of ninth July, 1798, provided for the valuation of lands, dwelling-houses and slaves, by assessors, to be appointed by commissioners. "Every dwelling-house above the value of one hundred dollars, and the lot" on which it was erected, not exceeding two acres, was to be valued at the rate such dwelling-house was worth in money, "with a due regard to situation." "All lands and town lots, except lots on which dwelling-houses" were erected, as aforesaid, were to be valued "by the quantity, at the average rate" which each lot was worth in money, "in a due relation to other lands and lots, and with reference to all advantages of soil and situation, and to all buildings and other improvements of whatever kind, except dwelling-houses aforesaid." In making the assessments, the assessors were to require from the owners or possessors of dwelling-houses, lands, or slaves, separate lists of each, and the lists of dwelling-houses were to specify their situation, dimensions, stories, windows, materials, etc. The lists of lands and lots were to specify the quantity of each tract or lot, the number, description and dimensions of all buildings thereon, except dwelling-houses aforesaid. And the assessors were themselves to make the lists for persons not prepared to exhibit the same, and where persons, on being required or notified, refused

or neglected to furnish the lists, the assessors were to enter on the lands, etc., and to make the lists from the best information they could obtain. After the lists were thus collected, the assessors were to value the same in a just proportion aforesaid, and to arrange the lands, dwelling-houses and slaves into three alphabetical lists. The principal assessor was then to give public notice in each assessment district, of the place where the lists and valuations were to be seen, and that appeals were to be received by him relative to erroneous or excessive valuations. The principal assessors were authorized to receive, hear and determine in a summary way, according to law and right, all appeals against the proceedings of the assessors; provided that the question to be determined on an appeal respecting the valuation of any lands or dwelling-houses should be whether the valuation complained of was in a just relation or proportion to other valuations in the same assessment district. The appeals were to be in writing, and were to specify the particular cause, matter or thing respecting which a decision was requested; and to state the ground of inequality or error complained of, by reference to some other valuations in the same district; and in all cases to which reference was to be made in any appeal, the principal assessor was authorized to re-examine and equalize the valuations as should appear just and reasonable. After the expiration of the time for appeals, the principal and other assessors were to transmit to the commissioners of the district copies of their lists and abstracts of their proceedings, and the commissioners were authorized, if manifest error or imperfection appeared in the abstracts, to require of the assessors that the same be explained and corrected. These are all the parts of the law that have relation to the assessment complained of.

By another act of congress of the fourteenth July, 1798, a tax was laid and assessed upon houses, lands and slaves, according to the above valuation, and the surveyor of the revenue was to make out lists of the sums payable for every dwelling-house and tract or lot of land, distinguishing what was payable for dwelling-houses, and what for lands, and the collectors were to be furnished with these lists, and were bound to collect the sums accordingly. In pursuance of this last act, the defendant entered and collected the sum as stated in the case.

1. Upon this case I am of opinion that the plaintiffs had a remedy provided by the act for the error alleged, and that the principal assessor, upon appeal, was competent to redress the grievance. The authority was in general terms to receive, hear

and determine, according to law and right, all appeals against the proceedings of the assessor. The limitation of the assessor's power upon appeal respecting the valuation of lands, etc., did not apply to this case, for here the appeal would not have been respecting the valuation, but respecting the error in placing the theater, which was not a dwelling-house, on the list appropriated to dwelling-houses. And as the plaintiffs did not avail themselves of the remedy, by appeal, they may be considered as having acquiesced in the proceeding of the assessors. Here is a special trust credited by statute, and a special remedy provided for the correction of mistakes in the execution of it; and I incline to the opinion that the determination of the principal assessor upon appeal was intended by the act to be of plenary discretion and final authority. The multifarious and minute detail of the proceedings of the assessor seems to render such a discretion absolutely necessary to the due execution of the law: Cowp. 524; 1 Burr. 544; for I distinguish this from those cases in the English books, where the assessors and collectors of their land tax have been held trespassers. There the commissioners had no authority at all over the subject-matter which they included in the tax: *Harrison v. Bulcock*, 1 H. Bl. 68. Here the theater was required to be assessed by the assessors, if a dwelling-house, then as such; if not a dwelling-house, then as a lot of ground, with due regards to the improvements thereon; and probably the valuation would have been just the same, whether it had been placed on the one list or the other. The assessors had jurisdiction of the subject-matter; they were bound to assess that building in the one view or the other, and in the exercise of that duty, it is alleged and admitted that they did exercise that judgment duly. But this is very different from the case in which they were not to exercise any judgment at all over the subject-matter; in which they had stepped out of their path, and taken cognizance of a subject not at all delegated to them. In such an instance their proceedings would have been truly *coram non judice*, and they trespassers. Here the subject was by law *sub judice*, and the grievance is a mere error, or mistake by them, while in the exercise of a lawful jurisdiction;

2. Another ground that may be taken upon this case is, that the grievance did not arise under the act of the fourteenth of July, by virtue of which the defendant entered. That act ordered a tax (of which the sum collected by the defendant was a part) to be assessed upon dwelling-houses, lands and slave, according to the valuations and enumerations to be made pursu-

ant to the act of the ninth of July. Congress, by this law, referred to and adopted the valuations that should be, in fact, made under the former law, without intending to discriminate between those valuations, should be accurately and truly in all respects made from those which should be, in fact, made and returned in pursuance of the first law. The act of the fourteenth of July having adopted the valuations under the law of the ninth of July, and ordered a tax to be laid and collected accordingly, it was a complete authority to the defendant to enter as stated in the case. It would be a doctrine, I apprehend, of most manifest inconvenience (if it could be maintained), that if a tax be ordered by the legislature, and to be assessed and collected according to some antecedent valuation, that the collectors of such tax become trespassers if peradventure there should be an error in the assessment or in the arrangements of the prior valuations.

In England the annual land tax is to this day apportioned and assessed according to an antecedent valuation made as early as the year 1692, and this practice generally and necessarily prevails in order to avoid the immense difficulty and labor of frequent valuations: 1 Bl. Com. 326. The continental assessments were also adopted by the legislature of this state in the assessment and collection of a state land tax; and in all these cases of reference to a valuation made or to be made by a former law, the true construction is that the document referred to is not to be assumed as accurate at the peril of the ministerial officer. The act adopting it necessarily ratifies it as sound for the specific purpose for which it is to be resorted to. And whether the reference be a valuation under a law of five days or five years antecedent to the time of making the reference, does not appear to me to make any difference in the principle. The *gravamen* now complained of by the plaintiffs did not arise under the act by virtue of which the tax was laid and the defendant entered, but under a prior law directing the valuation; and my opinion is, that the last act was a justification to the defendant, and for these reasons the plaintiffs are not entitled to recover.

LEWIS, C. J., declaring himself of the same opinion, ordered:
Judgment for the defendant.

MAGGRATH v. CHURCH.

[1 CASES, 196.]

CLAIM FOR LOSS OF PERISHABLE ARTICLES.—Where articles are included in a memorandum as perishable, they must be completely destroyed before the insured can recover as for a total loss.

CONTRIBUTION FOR DAMAGE TO PERISHABLE ARTICLES.—All damage directly resulting from a jettison should be contributed for, though it happen to articles described as perishable, and which remain in specie.

LIABILITY OF FREIGHT FOR CONTRIBUTION.—The freight actually gained or earned at the time a voyage is broken up, should be the basis for estimating a rule of contribution. ◆

INSURED LIABLE IN FIRST INSTANCE FOR CONTRIBUTION.—An insured may recover the contributory share due him for loss by jettison in the first instance from the insurer, before resorting to those entitled to contribute.

ACTION on a policy of insurance, in which on a special verdict, the following facts were found: That Le Roy, Bayard and McEvers, of New York, as agents for the plaintiffs who were merchants in Madeira, by a policy of insurance dated the tenth of September, 1798, insured five thousand four hundred and fourteen bushels of Indian corn, four thousand pipe staves, four thousand hogshead staves, and two thousand five hundred quarter cask staves from New York to Madeira, on board the Snow, Ann and Mary; that the prime cost of the corn was two thousand nine hundred and eighty-two dollars and ninety-eight cents, of the pipe staves one hundred and seventy dollars and thirty-one cents, of the hogshead staves ninety-five dollars and fifty cents, and of the quarter cask staves; that the freight for the corn was to be five hundred and fifty pounds sterling, for the staves one hundred and forty-eight pounds; and that the plaintiffs had an interest on board to the amount covered by the policy; that there was a memorandum in the policy by which it was agreed that salt, grain of all kinds, and Indian meal, and all other articles perishable in their own nature, should be warranted by assured free from average, unless general. That the vessel, being well fitted for sea, sailed on the voyage insured, on the seventeenth of the same month; on the twenty-first encountered squally weather and heavy seas, which continued till the twenty-sixth following, when the wind, blowing violently, suddenly chopped around and laid the vessel on her beam-ends, in which situation it became necessary for her preservation, and that of the cargo and crew, to cut away the mainmast; that in doing this, the mast splintered off, tearing away the cloth nailed to

the deck and mast to keep the water from running into the hold; and in consequence of this, as the sea was washing freely over the vessel, a vast quantity of water poured into the hold until a new cloth was nailed down; that this occupied an hour and a half, when there was found four feet of water in the hold, though one pump was kept going continually, the other having been carried away by the fall of the mast; that the vessel labored much with a heavy sea, and it became necessary on the twenty-seventh to throw overboard about half the staves; that she was so disabled that she was obliged to bear away to the nearest port, and on the seventeenth of October, arrived at Newcastle. That no stores could be procured there in which to store the cargo, nor any assistance to make repairs; and that the yellow fever was then raging at Wilmington and Philadelphia; that on the twenty-fifth or twenty-sixth of October, Le Roy, Bayard and McEvers received information that the vessel was at Newcastle, and of the antecedent circumstances, which they immediately communicated to the underwriters, and abandoned; that the vessel lay at Newcastle till the yellow fever abated, and then, on the thirtieth October, went to Philadelphia; that at the time of abandonment it was agreed Le Roy, Bayard and McEvers should send a clerk to Newcastle to take charge of the cargo belonging to the plaintiffs, for the benefit of whom it might concern, without prejudice to the rights of either party. That on unloading the cargo at Philadelphia, it was found so damaged as to be wholly unmerchantable, and that the damage to the corn was occasioned by cutting away the mast, which was done for the preservation of the cargo, crew and vessel. That the articles insured were, by consent of parties, sold for the benefit of all concerned, for nine hundred and twenty-four dollars, after deducting charges, which sum was paid to the owners of the vessel for freight, in pursuance of an award by arbitrators chosen for that purpose, the defendant, however, not being a party to the submission. That the Ann and Mary was repaired at Philadelphia, and ready to take a cargo on the twenty-eighth November, but as no corn of the kind of that before purchased could be obtained, the voyage was given up, and the vessel returned to New York.

If on the above facts the court should be of opinion that the plaintiffs were entitled to recover as for a total loss, the jury assessed the damages at twelve hundred and thirty-one dollars and fifty-four cents; if for a general average for the loss sustained by the injury to the corn, then at nine hundred and

nine dollars and sixty-one cents; if for a particular average, at two hundred and thirty-seven dollars and fifty-one cents.

It was agreed that if in estimating the general average the freight of the cargo to Madeira ought to have been taken into account, and not the freight actually paid at Philadelphia, that an alteration was to be made, accordingly in the sum to be recovered; that if the assured were not bound to look to the owners of the vessel for the proportion to be borne by the vessel and freight, then the loss to be considered as total.

In a former trial on the same policy, in which Le Roy & Co. were plaintiffs, the abandonment was, by the special verdict then given, found to have been made while the vessel lay at Philadelphia, where she could have been repaired for less than half her value; and the question then was, whether the corn, being damaged more than one-half its value, was susceptible of abandonment, and the underwriter responsible; or whether he was protected by the words of the memorandum. The bench decided, if the subject insured be in existence, there cannot be a recovery. There being, however, an average occasioned by the jettison, for which the assurer was bound, it became necessary to settle that; but before it could be adjusted the defendant died. This occasioned the present action.

Harison, for the plaintiffs.

Pendleton and Hamilton, for the defendant.

By Court, KENT, J., after stating the facts. This cause comes before the court upon a special verdict. Two questions have been made: 1. Whether the plaintiffs be not entitled to recover as for a total loss; 2. If not, then by what rule is a general average to be liquidated.

The first point was settled by this court, in the case of *Le Roy, Bayard and McEvers v. Gouverneur*. That case arose upon the same policy, and upon facts substantially the same. The question was on the construction of the words in the memorandum, free from average unless general; and the court decided that to make the insurer liable there must be an actual destruction of the article specified in the memorandum, and not merely such a technical loss of the article as would authorize an abandonment. Consequently, as the corn existed in that instance, the insurer was not liable for it, however deteriorated it might have been by the perils of the sea.

This decision was warranted and governed by the case of *Cocking v. Fraser*, Park, 114, which was a strong and unani-

mous determination of the court of king's bench, upon a case reserved on the very point in question. In that case the insurance was upon a cargo of fish from Newfoundland to a port of discharge in Portugal, and which was Figara. On the passage the crew threw overboard part of the fish, for the general preservation of the ship and cargo, and the ship was obliged to put into Lisbon, which was upward of one hundred miles from her port of discharge. It was there found upon survey that the fish was rendered of no value, through sea damage, and the ship did not proceed on her voyage. The court held the insurer liable for no more than what he had paid into court as a general average on the cargo, and a particular average on the ship. Lord Mansfield observed "that the insurer was liable only for a total loss, and that the total loss here was the loss of the thing itself, and not any damage, however great, while it exists. That in common cases, when the voyage is obstructed and not worth pursuing, it is a total loss. But the memorandum goes on the idea that the insurer is not to be liable for any damage, however great." Buller, J., observed also, "that the voyage being defeated might be very material in cases not within the memorandum." This decision, therefore, goes the whole length of settling that, although in certain cases a total loss may be in whatever defeats the voyage, and will authorize an abandonment, this will not hold in the case of perishable articles within the memorandum. The insurer there is secure against all damage to them, whether great or small; whether it defeats the voyage, or only diminishes the price of the goods. The memorandum prevents the loss from being total, unless the article be burnt, sunk, captured, or otherwise completely destroyed; and considering the difficulty of ascertaining how much of the loss arose by the perils of the sea, and how much by the perishable nature of the commodity, and the impositions to which insurers would be liable in consequence of that difficulty, the rule of construction as now settled is the most salutary, by reason of its simplicity and certainty. This difficulty would remain in full force if the law was otherwise, and the insurer was to be held for damage to the perishable articles, when that damage was so great as to occasion a loss of the voyage. One great object of the rule would, in such case, be defeated.

In delivering our judgment, I have been the more particular in explaining the former decision, and giving it my full acquiescence, from an impression which I received from the argu-

ment of this cause, that the decision was not sufficiently understood, or that it did not give all desirable satisfaction. The observation of Lord Kenyon, in the cause of *McAndrews v. Vaughan*, 1 Marsh. 150, would seem also, as it stands at present without explanation, to be opposed to the rule we have adopted; for he said the insurer was liable not only when the article was actually destroyed, but when the voyage was lost. If by this observation was meant that the insurer was held when the voyage was lost by some cause or peril not arising from the condition of the articles in the memorandum, it is not contrary to the rule contended for; but if it is to be understood as extending to a loss of voyage in consequence of damage, however great, to the articles in the memorandum, it is directly contrary to the decision of *Cocking v. Fraser*, and cannot be received as law.

It is to be observed that it is not stated in the verdict that no other vessel could be had at Newcastle to carry the cargo, but that the vessel in question could not there be repaired; and it is found that she was speedily repaired at Philadelphia, and was ready for the voyage, but that it was given up and deemed lost in consequence of the unmerchantable condition of the cargo, and because no other cargo of the like kind (it being Jersey flint corn) could be there obtained. This was evidently the real cause of the loss of the voyage, and, therefore, neither this nor the former decision apply to the case of a loss of voyage from injuries distinct from those happening to the perishable articles, such, for instance, as an irreparable damage to the vessel. That would be a loss of voyage in a case not within the memorandum, and liable to be regulated by other rules. As the plaintiff is not entitled to recover as for a total loss, the next point that arises for consideration is whether the plaintiff be not entitled to recover a general average, as fixed by the verdict.

A question here preliminarily arises, and that is whether the verdict be contrary to evidence in stating that "the whole of the damage sustained by the corn was occasioned by, or in consequence of, the cutting away the mast of the vessel, for the general preservation."

To support this finding, the evidence was, that in cutting away the mast, it splintered off at and below the partners, and tore away a piece of cloth which was nailed to the deck and mast; and by means of the splintering and the removal of the cloth, vast quantities of water continued to rush into the hold

of the vessel until the stump of the mast was cut off, and a new coat nailed over the same, which occupied about an hour and a half; during all which time, and for several hours afterward, the water made a free passage over the decks, and one pump was continually going, the other having been carried away and become totally disabled by the fall of the mast. In addition to these facts, there is the deposition of a witness, who heard the captain, mate, and crew say that the damage the corn sustained was principally in consequence of cutting away the mainmast.

Upon these facts we are not dissatisfied with the conclusion drawn by the jury. No other cause of direct injury to the corn is found. The one stated must have essentially injured the corn. The injury was inevitable, and the cause was sufficient to have produced the whole effect. We think the conclusion a reasonable one. We are, therefore, to consider the mast as sacrificed for the general safety of the ship and cargo, and that in the act of sacrificing the mast, or as a necessary consequence of it, the corn was damaged, and this damage must be included in a general contribution. The corn being damaged by the cutting away of the mast, is to be considered equally with the mast a sacrifice for the common benefit; a price of safety to the rest; and it is founded on the clearest equity that all the property and interest saved ought to contribute their due proportion to this sacrifice. The plaintiff is, therefore, entitled to recover as for a general average for the loss sustained by the injury done to the corn, and two remaining questions are next to be settled: Abbott, 278; 1 East's Rep. 228, by Lawrence, J., Park, 124.

The one is whether, in the adjustment of average, the freight of the cargo to Maderia ought to have been estimated, and not the freight only paid at Philadelphia. In this case, we think the adjustment, as settled by the award, ought to stand; for that the freight actually gained or earned in the voyage, and not what the vessel would have earned if she had gone to Maderia, ought to be the rule of contribution: Abbott, 291, 292; Marsh. 467.

The other question is, whether the totality of the contribution due to the plaintiffs, for the loss of their corn, is recoverable in the first instance from the insurer. We are of opinion that it is, because the loss arises wholly from a peril within the policy, and the plaintiff has a right to look for his indemnity from the person who has engaged to indemnify him from the

peril. This argument appears conclusive. This will not lead to a multiplicity of suits any more than a different rule; for if the plaintiffs could recover only a contributory share from the defendant, they would be compelled to resort to the owner of the ship for the residue; and this suit over may as well be brought by the insurer as the plaintiffs, for one great object of insurance is, promptly to reinvest the assured with his capital, lost by the perils of the sea, and thereby enable him to continue his commercial enterprises. In addition to this, it appears to be the English practice for the insurer to pay in the first instance the adjusted average: Abbott, 296.

We are accordingly of opinion that the plaintiffs are entitled to recover a general average. That in adjusting this average the freight has been properly estimated, and that the plaintiffs are not bound to look to the owner of the vessel for the proportion to be borne by the vessel and freight, and these points being established, the loss is to be considered as total, according to an agreement of the parties at the foot of the case.

LEWIS, C. J., concurred, except as to the question whether the injury received by the corn from the jettison of the mast, and the consequent irruption of the sea, could entitle it to a general average as between insured and insurer, upon which he expressed no opinion.

LIVINGSTON, J., having been concerned in the case, gave no opinion.

Judgment for the plaintiffs, according to the agreement on the case, as for a total loss.

This case is extensively noticed by writers on marine insurance. In his second volume, page 103, Parsons notices it as establishing the rule in New York, that if goods mentioned in memorandum articles exist in specie at an intermediate port, the insured cannot recover as for a total loss. It is cited on this point in *Moreau v. U. S. Ins. Co.*, 3 Wash. C. C. 259; *Potter v. Providence Ins. Co.*, 4 Mason, 301, *Marcadier v. Chesapeake Ins. Co.*, 8 Cranch, 48; *Hugg v. Augusta Ins. Co.*, 7 How. 606.

In the same volume, page 233, he notices it as holding that where the direct and immediate cause of the damage to perishable articles is some act done for the general preservation, the owner would have the same right to claim for general average as if the goods had not been in their nature perishable. On this point it is cited in *Griswold v. Union Mut. Ins. Co.*, 3 Blatchf. 234. Parsons, 2 Mar. Ins. 290, again cites the case as showing that the insured may claim of the insurers the whole amount of his loss in the first instance, transferring to them his claim for contribution; but in *Lapsley v. Pleasants*, 4 Binn. 602, a different rule is laid down. See 2 Phillips, sec. 1348.

On the point that the freight should be contributed for a case of jettison, it is cited in *Mutual Safety Ins. Co. v. The George*, Olcott, 168, and also 2 Parsons, 309, where it is laid down: "The ship earns the freight only by carrying its cargo to its destination. It is obvious, therefore, that if goods be jettisoned, it is not only the owner of the goods who loses thereby, but the owner of the ship loses the freight which he would have earned by carrying the goods. There would seem to be, therefore, no reason whatever why he should not have a claim for contribution for the freight thus lost. This is in practice adjusted as an average loss, and the authorities sustain this view."

BARNEWALL v. CHURCH.

[1 GAMES, 217.]

RISKS COVERED BY GENERAL POLICY.—A general policy, unaccompanied with any warranty, covers war risks of all kinds and of all countries. Under such circumstances a false clearance is immaterial, when the vessel actually sailed on the voyage intended, and the assured is not bound to disclose it.

SEAWORTHINESS.—Seaworthiness is always implied in a policy of insurance, and is not at the risk of the insurer.

ACTION on a policy of insurance on the ship *Hope*, valued at eight thousand dollars, and dated December 28, 1799, "at and from Kingston, in Jamaica, to Honduras, during her stay there, and at and from thence to New York." It appeared that the plaintiff purchased the vessel in question, relying upon the representations of two ship-carpenters in his employ, who reported that, after a thorough examination, they found the vessel to be perfectly sound and very strong, with a bottom of English elm, which never decays under water, and that she would last forty or fifty years; that plaintiff expended about six hundred pounds in repairs, during which some tainted timbers were mended and defective planks removed; that the vessel sailed on the voyage insured, and arrived safely at Honduras; that on her passage from thence to New York, as appeared from the captain's protest, she experienced heavy gales, though not such as to oblige him to strike topgallant-masts, and haul his topgallant-sails, and sprung a leak, and was forced to bear away to Honduras, where she was condemned as unseaworthy, upon the report of the surveyors that two-thirds of her timbers and several of her planks were rotten, and that much of her iron work had started.

The protest of the captain also stated that though he sailed for New York from Honduras, he cleared for Falmouth, in order to avoid a duty of one hundred and five pounds per ton, which must have been paid had the vessel cleared for any other than

an English port. It was proved, however, that the New York Insurance Company continued the risk on the policy after knowledge of this circumstance, without demanding anything additional.

To rebut the testimony of the surveyors, taken under a commission, that the vessel could not have been seaworthy and fit for the voyage when she sailed from New York, and that her general decay could not have taken place between the time of sailing and that of her survey, the plaintiff adduced the ship-carpenters who made the examination; and the master, who had last commanded her, who testified that she was strong and seaworthy when he left her, and that on her former voyage she had not leaked at all.

The jury found for the plaintiff as for a total loss; and a motion for a new trial was made: 1. Because the verdict was against evidence, the vessel not being seaworthy when she sailed; 2. That she never sailed on the voyage insured; 3. That if she did, and was seaworthy, there was not a sufficient disclosure, she having cleared for Falmouth, thereby increasing the risk.

Pendleton, Hoffman and Troup, for the defendant, contended that the state of the vessel was such that the verdict could not be supported; the testimony as to unseaworthiness was complete. The examination at the time of the purchase of the vessel and the subsequent report of the ship-carpenters, do not establish her seaworthiness: Park, 122, 222. On the second point, the defendant had strong reason to expect a verdict in his favor. The testimony of three persons showed the vessel sailed on a voyage to Falmouth, and not on one to New York; though this latter is afterward stated by the captain as being the real voyage; but as to this he contradicted himself. There was clearly a non-disclosure of the clearance being for Falmouth, and this being a concealment of a material fact, would, of course, avoid the policy. This further exposed her to a risk of condemnation, as having false papers: Abbott, 184; 1 Mol. 329 b, 2 ch. 2, sec. 9; Coll. Jur. 135, 136; 1 Rob. Adm. Rep. 871, 878, 124, 126, 165, 247, 248; 2 Id. 158, 161, 349; 3 Id. 77, 78, 80.

Hamilton and Harison, for the plaintiff, contended that seaworthiness was not implied by the mere contract of insurance; that latent defects were included in the risks taken by the insurer; provided she was seaworthy at the inception of the voyage, the progressive decay is at the risk of the underwriters.

To warrant the granting of a new trial on this ground, the evidence should be clear and manifest that the vessel was not seaworthy when the risk attached—that is, on her arrival at Kingston—and there is not a particle of evidence to that effect; whereas, every single fact separately taken proves her seaworthy at the commencement of the voyage. On the second point, the only evidence that could be relied on was the captain's, who could only know the real destination of the vessel; the others spoke from the papers alone; the apparent contradiction is easily reconciled, and the explanation given in the second protest is substantiated by the owner's letters, which proved the voyage sailed on, that which was insured. The object of the clearance for Falmouth is consistent with the known usage of trade, being merely to save the British duties. This very course of trade was relied on in the *Ostend case* (*Planche v. Fletcher*, Doug. 251), and allowed to regulate the mode of clearing out. Whether the concealment be a material fact or not, is a matter for the determination of the jury: *McDowal v. Frazer*, *Shirley v. Wilkinson*, Park, 205, 206, 207. There being no warranty in the policy, a capture, therefore, was a risk within it, and the underwriter cannot set up as a defense that from the papers the vessel ran a risk of being taken.

THOMPSON, J. The two questions arising out of this case for decision, are: 1. Whether the verdict was against evidence, on the question of seaworthiness; and, 2. Whether the plaintiff ought not to have disclosed to the defendant that the vessel would have a clearance for Falmouth.

There is, in every insurance, an implied warranty that the ship shall be seaworthy when the risk commences: that she shall be tight, strong, and in all respects fit for the intended voyage. The insurer undertakes only to indemnify against the extraordinary and unforeseen perils of the sea, and not against the ordinary perils to which every ship must be exposed in the usual course of the voyage proposed. If a vessel become incapable of proceeding on the voyage insured, the presumption *prima facie* is, that it arises from unseaworthiness, unless some adequate cause be shown to occasion the damage. But, if any such cause be shown, so that the loss may be fairly attributed to sea damage, and the underwriters mean to rely on the ship's not being seaworthy at her departure, the *onus probandi* will then lie on them. To test the present case by these rules, we find the only testimony, as to the immediate cause of the disaster, is that contained in the two protests. From the first, made by the master,

chief mate and one seaman, it appears that the vessel left Honduras the twenty-seventh of January. That on the twenty-eighth January, she met with strong gales, so that they were obliged to close reef the foretopsail, and close reef the maintopsail. That on the twenty-ninth strong gales, and a heavy sea from the northward, still under reefed sails, the vessel making much water. On the thirtieth, the wind abated, and nothing remarkable occurred until the second of February, when they found the leak increased to that degree that they could not keep her free from water with the pumps. They then bore away for Swan's Island, which being unable to reach, they determined to return to Honduras, where they arrived the thirteenth of February. During the above time, they encountered, at various periods, stiff gales and heavy squalls. Thus we find the ship, from the twenty-eighth of January until the thirteenth of February, a very considerable part of the time laboring under stiff gales and heavy weather, far beyond the ordinary perils of the sea. The master swears that shortly after leaving Honduras, he met with excessive hard winds; that the navigation was difficult and dangerous, and he was obliged to carry a very heavy press of sail, in order to avoid the reefs and keys; and that after he had met with considerable injury, and it was determined again to return to Honduras, he experienced heavy gales and various changes of weather. This, I think, sufficient to show that the loss may be fairly attributed to sea damage, and throw the *onus probandi* of unseaworthiness on the defendant. On this subject, the testimony is certainly very contradictory and in my opinion irreconcilable. The implied warranty on the part of the assured is, that the vessel was seaworthy at the commencement of the risk; this was on the twenty-first of November, 1799, while she lay at Kingston. The testimony on the part of the plaintiff is, substantially, that in April, 1799, when he had it in contemplation to purchase this vessel, he procured ship-carpenters to examine her, and ascertain her situation, previous to completing the bargain; no possible indictment, therefore, to a fraud, on the part of the plaintiff. They examined her accurately, bored in places most liable to rot, and found her sound; stripped off her sheathing, found her bottom English elm, and perfectly sound; her naval hoods and head knees sound; took off the plank so as to examine her top timbers, and found them sound and good. The testimony of Captain Dorgan, likewise, who arrived in March preceding from the West Indies, in this ship, with a cargo of five hundred hogs-

heads of sugar and molasses, tends to show that she was a very tight, strong vessel, and only ten years old. This, it is said, however, was seven months before the commencement of the present insurance. But if she was in the situation represented by these witnesses in April, it is inconceivable that she could be in the rotten and decayed state represented by the defendant's witnesses in November thereafter. The examination made by the defendant's witnesses was in February, 1800, three months after the commencement of the risk. All the progressive decay, therefore, from the November preceding, was at the risk of the underwriter. But it appears incredible that all this decay could have taken place in that period, for the defendant's witnesses represent that when she was surveyed by them, two-thirds of her timbers were rotten, many of her plank started and rotten; her bends so rotten and loose that with a crowbar they might have been ripped up for twenty feet; her upper works in a very bad state; and, in short, that there was a general decay of her timbers, bends, and plank. The master of the ship, however, swears that had she arrived in any port on the continent of America, she might have been repaired, fit for the voyage, for fifteen hundred, or two thousand dollars; but if she had been in the situation represented by the defendant's witnesses, she must have been irreparable. On the whole, the testimony is so directly and palpably contradictory that it is impossible to reconcile it. It thus becomes a question of credibility of witnesses, and this is peculiarly within the province of a jury to determine. Whether the vessel was seaworthy or not, is also a matter of fact, to be submitted to a jury. These points have been decided by a respectable jury of merchants; and in such case where the question is doubtful, and the testimony contradictory, I think the court ought not to interfere by granting a new trial, unless it appears that injustice has been done, or that further light may be thrown on the subject on another examination.

In the case of *Ashley v. Ashley*, 2 Str. 1142, the judge who tried the cause (which was upon a promissory note for five thousand pounds which the defendant insisted was forged), certified that the weight of the evidence was with the plaintiff, and he thought the jury would have found for the plaintiff, but they found a verdict for the defendant. And on an application for a new trial the court said as there was evidence on the part of the defendant, the jury were proper judges to determine which scale preponderated; and that it could not be said to be a verdict against evidence, and so refused to grant a new trial. The

same rule was adopted in the case of *Smith v. Huggins*, 2 Str. 1142, and a new trial denied, although the evidence was weak on the part of the plaintiff, and the judge who tried the cause strongly inclined against the verdict.

I am therefore of opinion, on the first point, that a new trial ought not to be granted.

With respect to the second question I think there can be but little difficulty. There is no doubt but that the real destination of this vessel was for New York, as described in the policy, and not for Falmouth, as the clearance purported. There is no contradictory testimony on that subject, except that in the first protest it is said, as in the clearance, she sailed for Falmouth and a market, but as to the actual place of destination of a vessel, I think the captain, unless his testimony is impeached, is entitled to full credit. He, of all others, is the most likely to know this fact; and he, when examined as to that point particularly, declares explicitly that she sailed for New York, though her clearance was for Falmouth and a market; and in this he stands corroborated by the testimony of Alexander Anderson, the plaintiff's agent at Honduras; I therefore take it for granted that the vessel sailed on the voyage insured. So far as any reasons could be discovered for taking out a clearance for Falmouth, it was to avoid the payment of certain charges that would otherwise have been incurred at Honduras. There was no warranty or representation, and it has been settled in this court in the case of *Murray v. United Insurance Company*, 2 Johnson's Cases, 263, that in such cases the underwriters take upon themselves war risks. Under a policy of this description I cannot conceive how this clearance could in any manner prejudice the underwriter or increase the risk; and therefore immaterial whether disclosed or not. In all the cases cited from Robinson's Adm. Rep., where false and colorable papers came under consideration, the question was as to the neutrality of the property; the papers purporting a different voyage or owners from the other testimony, and so considered a circumstance of fraud and suspicion. But as the present insurance is general and includes war risks, this clearance was immaterial. I am therefore of opinion that judgment ought to be rendered for the plaintiff upon the verdict of the jury.

RADCLIFF, J., concurred with THOMPSON, J., in the opinion that the ship sailed from Honduras on the voyage insured, and that the insurance being general the clearance for Falmouth was not material; but on the point of seaworthiness, after a

careful review of the evidence, he said: "There is great reason to doubt the propriety of the verdict, and considering the value in controversy, and that more light can probably be obtained, I think the cause ought to be reviewed. The circumstance that here was a struck jury is not of decisive weight in favor of the verdict, especially as it is founded on a point against which as a ground of defense it is known considerable prejudice exists. I am therefore of opinion that there ought to be a new trial on the question whether the ship was seaworthy.

KENT, J. The ship cleared out for Falmouth instead of New York. The clearance was for Falmouth and a market, although the ship was actually bound for New York. She was loaded with mahogany at Honduras, and cleared from there, and in sixteen days after she sailed she returned in distress. I state no more of the testimony in the case, because the facts stated are sufficient for the only point which I heard argued in the cause, and on which I give my opinion, viz.: whether there ought to have been a disclosure that the ship cleared for a different port than the one she was bound to. In this case the insurance was in time of war; but the case does not state that there was any warranty or representation that the property was neutral, and we are to intend, therefore, that there was none. The insurer, according to the decision in the case of *Murray v. United Insurance Company*, took upon himself the risk of enemy's property. The non-disclosure of the clearance for Falmouth could not then, in any possible view, be material, for the disclosure of the fact, if at all material, could only have been so as it affected the neutrality of the vessel. On this point, therefore, I am for the plaintiff, and that the verdict ought to stand."

LEWIS, C. J., delivered a lengthy opinion, examining the evidence and concurring with RADOLIFF, J., that on the question of the seaworthiness of the ship a new trial ought to be granted.

LIVINGSTON, J., having been concerned in the cause, gave no opinion.

On the point of seaworthiness, new trial granted.

Referring to this case, Thompson, J., in *LeRoy v. United Insurance Company*, 7 Johns. 353, says: "It is always a question how far the want of disclosure of a paper admitting it to be intentionally a false one was material to the risk. This was the doctrine in *Barnewall v. Church*, 1 Caines, 217."

It is noticed by Porter, J., in *Walsh v. Washington Insurance Company*, 32 N. Y. 437, where he holds: "Where the inability of a ship to perform

its voyage becomes evident soon after leaving port, and it founders without stress of weather or other adequate cause of injury, the presumption is that this inability existed before setting sail, and that it is due to some latent defect which rendered the vessel unseaworthy: *Alcott v. Commercial Insurance Company*, 2 Johns. 123; *Barnewall v. Church*, 1 Caines, 217; *Paddock v. Franklin Insurance Company*, 11 Pick. 227; *Watson v. Clark*, 1 Dow. Parl. R. 336."

Writers on Marine Insurance notice this case very extensively. Thus Phillips notices it in sections 598, 724, 994, 1086, of his work on Insurance. In section 598, he says: "It is not necessary to inform the insurers that for the purpose of saving duties, the ship takes out a clearance for a port of destination different from that for which in fact she sails, unless the false clearance affects the risk materially." And in section 994, he says: "The clearing for a port different from that to which the ship is insured, and for which it actually sails, does not make the voyage another than that insured."

It is also noticed in several places by Parsons, in his work on Marine Insurance. In the first volume, p. 379, he cites it among many others to the statement: "As seaworthiness is a condition precedent to the right of the assured to recover, it would seem to belong to him to establish that fact, and so it has been held. Now, however, the law is different in many of the states. But if the vessel springs a leak soon after sailing, without having met with any peril, this raises a presumption that she was unseaworthy when she sailed." And in the second volume, p. 42, citing this case as authority, he says: "If the ship actually sails on the voyage intended, the fact that she cleared for a different voyage does not discharge the insurers."

The case is cited in *Lloyd v. Scott*, 4 Cranch. C. C. 222, on the point that a new trial would be granted, although there was direct and palpable contradictory testimony. But it appears the case is not very decisive on this point, and therefore this is not noticed in the syllabus as we have stated it.

The case of *Murray v. United Insurance Company*, 2 Johns. 263, which the court cited, was this: The vessel was captured by a friend; there was a general policy; and it was held that though not so expressed, the policy was extensive to include such a case, and a capture by a friend was one of the perils insured against.

ABBOTT v. BROOME.

[1 CAINES, 202.]

WHAT CONSTITUTES LOSS OF VOYAGE.—If a vessel be rendered, by the perils against which she is insured, unable to proceed with her original cargo, it is a loss of the voyage, though she may be capable of performing it with a lighter cargo.

ABANDONMENT, WHEN MADE.—When a vessel cannot be repaired for half her value, the insured is entitled to make an abandonment.

WAIVER OF ABANDONMENT.—If a vessel be duly abandoned, and the abandonment refused, and a sale be made for the benefit of all concerned, under an admiralty order adjudging her not worth repairing, and she purchased by the supercargo, a part owner, it is no waiver of the abandonment, notwithstanding on her arrival home she is sold at

auction by the insured for more than she cost, and he, at the time of action brought, has the proceeds in his hands; and he is not obliged to make a tender of her to the underwriter when she arrives, nor of her proceeds after the sale.

ACTION on a policy of insurance upon one-eighth of the ship *Mary*, valued at two thousand eight hundred and seventy-five dollars, on a voyage from Batavia to New York, tried before Lewis, C. J., at the New York circuit, November, 1800.

On the trial, it appeared that the vessel, while on the voyage insured, encountered heavy gales of wind, which so disabled her that she was forced to bear away to the West Indies, where she arrived, at the island of St. Christopher, in January, 1799; that the cargo was unloaded and a survey ordered on the application of the master, in co-operation with the supercargo, who was also a part owner of the ship; that on the report of the surveyors that she was so damaged that she could not be repaired for half her value, and that it would be dangerous to reload and proceed on her voyage, a sale was ordered, at which the supercargo became the purchaser, on behalf of the assured, for four thousand seven hundred dollars; that learning the situation of the vessel, the plaintiff, previous to the sale, abandoned to the underwriters, who refused to accept. It was admitted that in the following spring she came to New York with a light cargo; that on her arrival she was not offered to the defendant, but was sold by the plaintiff, at public auction, without defendant's consent, for ten thousand one hundred dollars; that the interest of all the owners in the vessel was not insured.

Hamilton, for the plaintiff, after stating that the right of the assured to recover as for a total loss could only be prevented by the subsequent purchase, contended that this purchase did not amount to a waiver of the abandonment, as the assured did not take the vessel back and fit her out for his own use, but sold her at auction for the benefit of all concerned, an act which the assured was forced to by the positive refusal to accept the abandonment, in order to prevent any further deterioration; that the mere selling was not a waiver of previous abandonment: *Bowne v. New York Insurance Company*; that an offer of the ship to the insured, upon her arrival at New York, was not necessary after a positive refusal to accept.

Hoffman and Harison, for the defendant, contended that the loss was partial only: *Shaw v. Gould*, 1 Johns. Cas. 293; that

the insurance on the vessel and that on the cargo were distinct, and although the cargo may have been lost, it did not entitle the assured to abandon as for a total loss on the vessel: *Poole v. Fitzgerald*, Willes's Rep. 641; that the subsequent purchase was a waiver of the abandonment: *Saidler v. Church*; that it must be presumed the purchase by the assured was on his own account, as he had never offered to account to the underwriters for the proceeds of the sale.

By Court, RADCLIFF, J. In this case the general question is, whether the plaintiff is entitled to recover a total or a partial loss. Two objections have been made against the recovery for a total loss:

1. That the case of a total loss never existed;
2. That the purchase at St. Christopher's by the supercargo, who was also a part owner of the ship, and the subsequent sale at New York, without the consent of the defendant, or a previous offer or tender of the ship to him amounted to a waiver of the abandonment, and an adoption of the vessel as his own.

With respect to the first, it appears that the ship was condemned at St. Christopher's, as unfit to proceed on her voyage, on account of the injuries she had received; and the persons appointed to survey her there certified that, in their opinion, she could not be repaired for her full value when repaired. It is also admitted on the part of the defendant, that in consequence of the disasters experienced on the voyage, she was so much injured that it was impossible, from the high prices of wages and materials, to repair her at St. Christopher's for half her value, so as to enable her to bring on her whole cargo. It is again admitted on the part of the plaintiff, that in the spring following, the ship came to New York with a light cargo of molasses and rum, being about sufficient for ballast, and that she might have brought a full cargo of rum, which was proved to be very light and buoyant. On these facts, I am of opinion that there existed a case of a technical total loss, and that the assured had a right to abandon. The question in such cases is not whether the vessel be in a capacity or in a situation to be repaired, so as to prosecute her voyage with a half, or any other portion of her cargo, but whether she is capable of proceeding, or of being refitted to proceed, and carry the whole. A vessel is not seaworthy unless she be in a condition to carry a full cargo. The contrary idea is novel and inconsistent with every principle of propriety and safety in navigation. The vessel was insured to perform her voyage and carry her cargo from Batavia

to New York. This she was disabled from doing. The enterprise, therefore, failed, by means of the perils insured against, and the plaintiff had a right to abandon and claim a total loss.

The second question is, whether he has waived this right. The vessel was ordered by the court of admiralty at St. Christopher's to be sold for the benefit of all concerned. The supercargo, who was one of the owners, purchased her on account of the assured. The assured had previously, on receiving advice of her condemnation, and before any notice of the purchase, abandoned his interest to the underwriters, who refused to accept the abandonment. In what manner the supercargo, being also one of the owners, might be affected by the purchase, it is unnecessary to determine. The question is, whether the plaintiff ratified his acts subsequent to the abandonment, and recognized the purchase as his own. In the case of *Saidler and Craig v. Church* (July term, 1799), after an abandonment, a similar purchase was made, and the assured adopted it as their own, by availing themselves of the advantage it offered, and fitting out and sending the vessel on another voyage for their own account. Under these circumstances, we considered the assured as having affirmed the purchase, and waived the abandonment.

The present case differs in this, that the plaintiff has done no act to affirm the purchase. He has not appropriated the vessel to his own use, and has not attempted to derive any benefit from the purchase. The vessel was sold at auction on her arrival at New York, and purchased by a stranger. Although it is not expressly stated in the case, the sale must be presumed to have been made for the benefit of the underwriters. It is objected that the plaintiff ought again to have offered to deliver them the vessel, or have consulted them as to the propriety of the sale. I think this was not strictly necessary. The abandonment was an offer to cede all his title and the possession of the vessel, as far as under the circumstances it was capable of being delivered. The plaintiff was not bound to do more, and it being a case proper for abandonment, the defendant ought to have accepted it; or, at least, the refusal was at his peril. He did not accept, and the plaintiff was necessarily left to act as his trustee in the disposition of the property. If he executed the trust fairly, he has discharged his duty, and it was not incumbent on him to follow the defendant, and repeat his application to receive what he ought at first to have accepted. The sale at auction was, therefore, justifiable, and the defendant ought to be charged

with a total loss, deducting the proceeds of the sale, and the value of the freight from St. Christopher's to New York.

Judgment for the plaintiff for a total loss.

See *Abbott v. Sebor*, ante 139. The following account of *Saidler v. Church* is given by the reporter, 1 Caines, 297: "The frequent allusion to the case of *Saidler and Craig v. Church*, making it in some degree a part of the present, the reporter has thought it necessary to state the facts of it as represented in the case made for the opinion of the court. They were, that the insurance made in the name of Thomas White, was made for and on account of the plaintiffs, and that they were the sole owners of the vessel mentioned in the policy. That the vessel in her due course on the voyage insured was captured by a French privateer, and carried into Guadaloupe, and thereby her said voyage to the Havana was totally lost. That at Guadaloupe the vessel was duly libeled in the admiralty court, and was there condemned, and after condemnation was purchased by George Duplex, the master, as for the account of the owners, for the sum of eleven hundred and twenty dollars. That the said master was also a part owner. That the owners had since fitted out the said brig, and sent her on another voyage. That as soon as the owners knew of the capture, and before they were informed of the condemnation, or of the purchase by the captain, they gave the underwriters notice of abandonment."

HOPKINS v. BEEDLE.

[1 CAINES, 347.]

WORDS ACTIONABLE IN SLANDER.—An action for slander is not maintainable for saying one is forsworn, but it is otherwise when it is said that he is perjured.

GENERAL VERDICT, WHERE SOME COUNTS GOOD, OTHERS BAD.—In an action for slanderous words, if those in some counts be actionable, and those in others not, and entire damages be given, judgment will be arrested. If the plaintiff apply, he may, on the payment of costs, have a *venire de novo*.

ACTION of slander for words spoken of the plaintiff in the discharge of his duty as an overseer of highways. In the first count, the charge was for saying: "You have sworn to a lie, and I will prove it." In the second: "You have sworn to a lie." And in the third: "You have perjured yourself as one of the overseers of the town of Washington, and I can prove it." The jury found generally for the plaintiff, and a motion was made for an arrest of judgment on the following grounds: 1. That the words in the first and second counts were not in themselves actionable, and no special damage was alleged; 2. That it was not alleged in the first and second counts that the lie declared by the defendant to have been sworn to by the plaintiff, had not been sworn to in a court of justice, or before a person com-

petent to administer an oath; 3. That the charge of perjury alleged in the third count to have been imputed by the defendant to the plaintiff, cannot, by the laws of this state, amount to a charge of perjury, it being necessarily a charge of violating the promissory oath taken by the plaintiff as one of the overseers of the highways of the town of Washington; 4. That the verdict was general.

The case was submitted without argument.

By Court, KENT, J. This is a motion in arrest of judgment. The verdict was general. It is urged on the part of the defendant that the words in the first and second counts are not actionable, and that it was not alleged that any oath was taken by the plaintiff before any person competent to administer it. It is further urged that the charge in the third count relates only to the promissory oath of office, for which an indictment for perjury will not lie.

We are of opinion that the objection to the first and second counts is well taken. Swearing to a lie does not necessarily imply that the party has, in judgment of law, perjured himself. It may mean that he has sworn to a falsehood, without being conscious at the time that it was a falsehood. Actionable words are those that convey the charge of perjury in a clear unequivocal manner, and which admit of no uncertainty. The charge is defective in not stating any court or competent officer before whom the plaintiff swore: Com. Dig. tit. Action on the case for defamation, F. 5, F. 18; 1 Roll. Abr. 39, n. 40. It may mean extrajudicial swearing, and, therefore, it is held that a charge that one is forsworn is not actionable, because it shall not be intended in a case where perjury may be committed. On the other hand, a charge that one is perjured is actionable; for that implies the direct legal crime.

With respect to the third count, we are of opinion that it is sufficient to sustain an action; but as the verdict is general, the judgment must be arrested; the plaintiff, however, on application, might have been entitled to a *venire de novo*, on payment of costs.

Judgment arrested.

See *Rue v. Mitchell*, 1 Am. Dec. 258, for a decision on a similar point as to a charge of being forsworn; and as to the effect of a general verdict where there are good and bad counts, see *Neal v. Lewis*, 1 Am. Dec. 640, where a different rule is laid down, but one, however, which is not generally held. The decision in this case gives the more correct and general rule on this point.

In *Green v. Long*, 2 Caines, 91, an action was brought for saying of the plaintiff, "you have perjured yourself." The plea was not guilty, with a notice subjoined that it would be proved on the trial that the plaintiff was examined as a witness before a court-martial held agreeably to law, upon the defendant as a captain for disobedience of orders. The plaintiff proved the words as referring to him, but the defendant urged that in addition to this testimony the proceedings of the court ought to have been produced, and that its competence to administer an oath must appear. On this ground the plaintiff was nonsuited. Application was made for to set aside the nonsuit, and for a new trial. Kent, C. J., who presided at the trial, now delivered the following opinion: "I am clear I was wrong at *nisi prius*. It ought to have been intended and presumed that everything took place before a court of competent jurisdiction. The *onus* lay on the defendant to show it was otherwise. As to the argument that there might not have been any such court as that in which the perjury was alleged to have been committed, it would, in my opinion, have been an aggravation of the offense. The assertion might have had all the effects of a charge of perjury before a competent jurisdiction. I am therefore for granting a new trial with costs to abide the event of the suit."

JACKSON v. BOWEN.

[1 CAINE, 358.]

PAROL TESTIMONY, WHEN INADMISSIBLE. — Parol testimony cannot be received to show that a deed stating a course for thirty-six chains was intended to express twenty-nine.

POSSESSION AS A BAR TO RECOVERY IN EJECTMENT. — Actual possession under an adverse claim for twenty years and upward, with a claim of title in other lands forming a part of the lot of which actual possession is taken and by right of each possession, is a bar to a recovery in ejectment.

ACTION of ejectment tried before THOMPSON, J. The facts were: The lessors of the plaintiff and the defendant derived their titles under the will of Victor Putnam, their grandfather, who had devised in severalty, one hundred acres of undivided land to each of his children, and the overplus to be divided among his four sons. Johannes, the father of the lessors of the plaintiff, was one of the children, and Mary Bowen, the mother of the defendant, was another. By a deed of partition, reciting the will, the one hundred acres devised to Mary were set out, and the residue apportioned among the four sons. The north and south lines of Mary's and Johannes's tracts were the same; the dispute was respecting the east and west boundaries. If the lines and courses were run according to the deed of partition, the lands in controversy would fall within the limits of the plaintiff's division, but Mary Bowen would not then have her

one hundred acres. If, however, the acknowledgments of the ancestor, of the lessors, and themselves, together with a claim of right though not a *pedis possessio* of the whole were to prevail, the defendant would be entitled to recover.

On the trial, parol testimony was offered to show that the partition deed, in giving a course as thirty-six chains, made a mistake; that it should have been but twenty-nine chains; and that by running the line that distance, the several tracts of land would be established in conformity to the will and in strict accordance with known landmarks. The judge overruled the testimony as contradictory to, and not explaining the deed. The jury found for the plaintiff; whereupon the defendant moved to set aside the verdict and for a new trial, on the grounds that the verdict was against evidence and the law, and misdirection of the judge.

Cady, for the defendant.

Van Vechten, for the plaintiff.

By Court, THOMPSON, J. An application is made for a new trial on two grounds:

1. That the verdict was against evidence; and, 2. That the court improperly precluded the defendant from showing that there was a mistake in the partition deed under which the parties respectively claimed, by which the lessors of the plaintiff had more land than was intended to have been conveyed.

From the testimony, as stated in the case, it appears that Johannes Putnam, the father of the lessors of the plaintiff, and Mary Bowen, the mother of the defendant, were brother and sister, and children to Victor Putnam, under whose will, bearing date the fifth of July, 1755, they derived title. That on the nineteenth day of September, 1765, the children of Victor Putnam executed a partition deed, whereby lot number one was conveyed to Johannes Putnam, father to the lessors of the plaintiff, and lot number eight to Mary Bowen, mother to the defendant; and the question between the parties is, where is the line of division between the two lots? The plaintiff having made out a title to lot number one, and the defendant to lot number eight, James Lansing, a surveyor, and witness on the part of the plaintiff, testified that he had run the western and northern lines of lot number one according to the partition deed, and that some of the premises in question, according to such survey, were included in that lot.

Jacob Rees, a witness on the part of the defendant, swore he

was fifty-five years old, and that, as long ago as he could remember, Mary Bowen was in possession of the land now held by the defendant, and that she died in possession; she had some land inclosed in fence down as far south as the road; she used to live four or five hundred paces south of the road, but that just before the war she moved down close to the north side of the highway. That about fourteen or fifteen years ago, Johannes Putnam showed him his west line, and told him he began at the Mohawk river, and ran northerly nearly to the highway, to a pine tree, and that the land north of that was his sister's, Mary Bowen. That when Johannes showed him this line, Mary was in possession of the land north of the road. That about seven or eight years ago, Francis I. Putnam put up a stone near the pine tree shown him by Johannes, and said that was his corner; and that at this time the defendant was in possession of most of the land on the north side of the road, which he now holds. That the whole of the land now held by the defendant was not cleared or in fence at the time of Mary Bowen's death.

Jacob Hall, another witness on the part of the defendant, swore that about thirty-six years ago Johannes Putnam told him his land went no further north than the road, and that Mary Bowen owned the land north of the road. That at this time, or shortly after, Mary Bowen lived near the road; she had before lived further north. Johannes Putnam called the witness particularly to show him where his line was. It appeared also, by the testimony of Abraham Conyne, that about ten years ago he applied to Francis I. Putnam, to rent him part of a house that stood near the road, on the north side; that the said Francis declined hiring it to him, but referred him to the defendant, of whom the witness leased the house for one year; the witness understood that Putnam did not claim north of the road. Lewis Clement also testified that about seven or eight years ago he assisted Francis I. Putnam in making a fence between these lots on the south side of the road; that the defendant came to them and inquired of Putnam if he was making the fence on the line, to which he answered that he was, as it had been shown by Jacob Rees and the defendant. It appeared also that Mary Bowen died about fifteen years ago.

On the part of the plaintiff it appeared that part of the premises in question adjoining the road were unimproved at the expiration of the war. It also appeared that about six or seven years ago the lessors of the plaintiff claimed the premises

by threatening to dispossess one Peter Lawrence, who afterward took a lease under them. But Lawrence had the possession from Jacob Rees, who held under Abraham Conyne, who, it appears, had hired it from the defendant.

The partition deed between the ancestors of the parties bears date in the year 1765, wherein lot number one, claimed by the lessors of the plaintiff, is described beginning at the Mohawk river, and running a northerly course thirty-six chains, describing no monument at the termination of this line. It appears from the testimony of the surveyor that to extend this line northerly the number of chains given in the deed, and then pursue the other given courses, would include part of the premises in question. But the testimony on the part of the defendant appears to me to be strong and irresistible with respect to the actual possession for a long series of years; and that in fact no possession was ever had of the premises by the lessors of the plaintiff, or their father under that deed. And that, admitting the deed to cover the land, still the plaintiffs, and those under whom they claim, have abandoned it for such a length of time as to preclude them from a recovery, at least in this form of action. It is true a man may be mistaken with respect to his title, and perhaps ought not to be concluded by his confession, if made under circumstances inducing a suspicion of imposition or ignorance, neither of which appears in this circumstance, and when acquiesced in for a length of time, as in the present case, he ought to be concluded. It appears that the premises lay north of and adjoining to the highway, which is the division line between the parties, according to their present possessions; the lands of the plaintiff lying to the south, and those of the defendant to the north of this road. Two witnesses on the part of the defendant testify that as much as thirty-six years ago, which must have been very shortly after the partition, Mary Bowen was in the possession of the premises, the possession of Johannes Putnam going no further north than the highway; and it appears by the testimony of one witness that as far back as the period above mentioned, Johannes Putnam showed him the line between him and his sister Mary, and declared to him that his land went no further north than to the road; that the land north of the road was his sister Mary's. The same declaration was made to another witness about fourteen or fifteen years ago, and since the death of Johannes Putnam, the lessors of the plaintiff have repeatedly recognized the same line, both by their declarations and acts,

and never showed any dissatisfaction until about six or seven years ago. Thus it is clear and conclusive from the testimony that the defendant and Mary Bowen, his mother, under whom he claims, have been in possession of the premises for at least thirty-six years, claiming them and using them as their own, adversely to any other claim, and with such repeated recognitions by the lessors of the plaintiff and their father, of the right of Mary Bown, as to show conclusively that they disclaimed having any right or title to the premises, which is sufficient to rebut every presumption that Mary Bowen held under them. The premises being held under such circumstances for such a length of time, is, we think, sufficient to protect the possession against this action.

We are of opinion, therefore, that the verdict is against evidence, and that a new trial ought to be granted.

Being in favor of a new trial, it would be unnecessary to give an opinion on the other question, did the court entertain the least doubt on the subject. The plaintiff's deed gives thirty-six chains on the first line; the defendant contended it ought only to have been twenty-nine chains, and the testimony offered and overruled was to prove that fact; this was not to explain any ambiguity, but was directly contradictory to the deed, and manifestly inadmissible.

NASH v. TUPPER.

[1 CASES, 402.]

STATUTE OF LIMITATIONS, PLEA OF.—Where a contract is sought to be enforced in a state other than that in which it was made, the defendant may plead the statute of limitations of the former, as a bar to the action.

ACTION upon two promissory notes, made in the state of Connecticut, and dated twenty-eighth November, 1791. The plaintiff declared in the ordinary manner, adding a count for money had and received. Plea, *non assumpsit* and *actio non accrevit infra sex annos*. The plaintiff replied specially, stating that the notes were made and given in the state of Connecticut and with reference to her laws; that the cause of action arose within the jurisdiction of that state; that the statute of limitation of Connecticut ran for seventeen years from the time the action accrued; and withdrew the count for money had and received.

A general demurrer was interposed, upon which the case came before the court.

Emott, for the defendant, stated that the question in the case was how far the laws of Connecticut should control the operation of those of New York, and argued that although the *lex loci contractus* controlled in questions arising upon the validity of a contract, yet where the remedy was the point under consideration the *lex fori* should govern; that to take the case out of the statute of this state plaintiff should have shown that the defendant continued to reside in Connecticut until within the last six years. That the statute of limitations may be pleaded to a foreign contract, see *Robinson v. Bland*, W. Bl. 241. Lord Mansfield lays down the rule, *Id.* 288, that the law of the place where the action is brought is to be considered in expounding and enforcing the contract. To the same effect are *Duplein v. De Roven*, 2 Vern. 540; 2 Kames, 353, 3d edit.; *Lodge v. Phelps*, 1 Johns. Cas. 139. The obligation of this contract is not impaired by the application of the statute of the state where the relief is sought; the contract remains as it was; but when it is attempted to be enforced against the laws of New York, they interpose. Should the contract be carried back to Connecticut, then the statute here, and the judgment under it, is of no avail. The plaintiff is bound by our laws; he has brought his action here, and all that he can claim is the benefit of those laws to which he has resorted.

Gold, for the plaintiff, contended that by the laws of Connecticut, where this contract was made, specialties and simple contracts are placed on the same footing; that to say that the laws of New York will consider as a simple contract what the creditor received as a specialty, is nothing else than to expound the *lex loci contractus*, according to the *lex fori*. Upon the variance of the laws of different countries it is laid down, 2 Fonb. 442, that the law where the contract is made shall prevail, except where reference was had to the laws of another state. A marriage contract made in France will be enforced according to her laws in England, though contrary to the laws of England: *Feaubert v. Turst*, P. in Chan. 208; as to the validity of a note not stamped according to the *lex loci*, see *Alves v. Hodgson*, 7 Tr. 241. In *Wright v. Null*, 1 H. Bl. 148, 149, the laws of Georgia, on a question of confiscation, were as much regarded as they would have been in that state. To the same effect, *Burrows v. Jermino*, 2 Str. 732; 5 Vin. Abr. 511, pl. 22; *Jewson v. Reed*, Lofft, 138;

Crawford v. Witten, Id. 154. The case of *Melan v. The Duke de Fitzjames*, 1 Bos. & Pull. 138, is decisive; there the remedy alone was the point in question, and it was determined that a man cannot be held to bail in England upon a contract to pay money made in France, when by the laws of that country his body could not be imprisoned for the debt. If, as is contended, the statute of limitation merely suspends the remedy, it would be a matter of abatement, and should have been so pleaded; and the defendant should have set forth his residence in New York for the six years last past, if he thought to avail himself of that defense. The doctrine contended for by opposing counsel would place the right to recover upon a contract within the control of the debtor, and render judgments insecure.

Counsel further urged that the laws of the individual states were entitled to the greatest respect on the part of one another; that this obligation to respect the laws of a sister state was enforced by the constitutional provision that "no state shall pass any law impairing the obligation of contracts;" and submitted that to allow the laws of New York to prevent the plaintiff from recovering would be a violation of that prohibition.

By Court, LEWIS, C. J. This is an action of *assumpsit* on two promissory notes made by the defendant to the plaintiff. The question arising on the pleadings is, shall the *lex loci contractus* govern, or shall it not?

It is a well settled rule, that contracts, with a few exceptions, are to be construed according to the laws of that country in reference to which they are made. But it is equally well settled, that the remedy on them must be prosecuted according to the laws of that country in which the remedy is sought. In the case of *Duplein v. De Roven*, the cause of action was in France; it was on a judgment obtained in that country. The defendant pleaded the statute of limitations, and held a good bar to the action.

In *Lodge v. Phelps*, decided in October term, 1799, it was held that though promissory notes, made in Connecticut, were not there negotiable, they might be negotiated here and a suit maintained on them in the name of the indorsee. For that the principle of the *lex loci* shall not affect the form of action, but shall have reference only to the nature and construction of the contract, and its legal effect; not to the mode of enforcing it.

In a much earlier case, viz.: that of *Page v. Cable*, decided in this court, in April term, 1795, the precise question now before us came under consideration. It was an action of *assumpsit*, on

a promissory note made in Connecticut, by George Cable to Jonathan Cable, the defendant, and by him indorsed to David Page, the plaintiff. The whole transaction took place in Connecticut. The plaintiff declared, first, under our statute as indorsee; secondly, on the indorsement as a special engagement, setting forth the contract as originating in Connecticut, and the defendant as guaranteeing the payment by George Cable, and on his default engaging to pay for him.

The defendant pleaded the statute of limitations of this state, and the plaintiff demurred, alleging for cause that no such statute existed in Connecticut, where the cause of action arose. The court said that the plaintiff, having elected to prosecute his suit in this state, he must pursue his remedy agreeable to our laws, and that our courts could not dispense with an adherence to the requisites of time, place and manner of commencing and prosecuting a suit because the cause of action arose in another state. They conceived that such adherence by no means impaired the obligation of the contract, and they gave judgment for the defendant.

The correctness of those decisions I feel no disposition to controvert. But conceiving the law on the point as settled, we are of opinion judgment must be for the defendant, and with this opinion the Scotch and Dutch laws accord, as will appear from Erskine's Institutes, vol. 2, 581, 582; 2 Kames's Equity, 358; 2 Huberi Praelectiones, book 1, tit. 8; De Conflictu Legum, sec. 7.

LIVINGSTON, J., dissenting.

Judgment for the defendant.

Noticing this case as authority, Kent (2 Com. 463) says: "The statute of limitations of the state in whose courts a suit is prosecuted, must prevail in all actions. To guard, however, against the inconvenience of sustaining and enforcing stale demands, not yet barred by a residence under the change of domicile, a presumption of payment will be indulged, and may attach to and destroy the right of recovery."

The case is cited by Parsons (2 Cont. 588), where he says: "But on the trial, and in respect to all questions as to the forms, or methods, or conduct of process or remedy, the law of the place of the forum is applied." Again: "It seems quite well established that a foreigner bringing an action on a debt which is barred by the lapse of time in the state where it is sued, but would not be at home, is bound by the law of the forum, and cannot recover payment." Id. 590.

Story on the Conflict of Laws, sec. 470, noticing the case, says: "The forms of remedies and the order of judicial proceedings are to be according to the law of the place where the action is instituted, without any regard to the domicile of the parties, the origin of the right, or the country of the act."

LEAVENWORTH v. DELAFIELD.

SAME v. DALE.

[1 CASES, 572.]

GENERAL AVERAGE, WHAT SUBJECT TO.—Wages and provisions necessary for the support of the crew during the detention of a vessel captured and carried in for adjudication, are properly subjects of general average.

FREIGHT, ESTIMATION OF IN CASE OF CAPTURE.—If a vessel be captured during her voyage, the freight will be chargeable up to the day of such capture, in a settlement of proportion for general average.

AMOUNT ON WHICH GENERAL AVERAGE CALCULATED.—The amount on which a general average, in case of capture, is to be calculated, is the first cost or invoice price of the cargo, and charges at the port of departure; on the vessel, four-fifths of its value at the same place; and on the freight at one-half agreed to be paid.

Actions of policies on insurance from New York to Havre de Grace. The first was a policy on the freight, valued at two thousand dollars; the other on the ship, valued at seven thousand dollars.

The facts were thus stated, and the opinion of the court asked thereon: July 23, 1801. The vessel sailed from New York on her voyage. September 4, 1801, she was captured in the British channel, and carried into Ramsgate. November 12, 1801, an abandonment was made of both policies to the defendants in the two causes, which they refused to accept. January 4, 1802, she was liberated, and after sailed for Havre, where she arrived and delivered her cargo. November, 1802, the defendants accepted the abandonments and consented to verdicts against them, subject to calculations as to the amount to be recovered against them on incidental causes.

It was agreed that the court charges and other expenses attending the reclamation of the property, including port charges, and exclusive of wages and provisions, amounted to four thousand one hundred and twenty-one dollars and twenty-four cents; that the ship's crew consisted of a captain, mate, seaman, a cook and boy, whose monthly wages amounted to two hundred and twenty-one dollars, their provisions to one hundred and ten dollars and fifty cents; that the vessel had performed eight-ninths of her voyage as to distance when she was captured.

Upon these facts and admissions, the following questions were submitted to the consideration of the court:

1. Whether the wages and provisions of the crew are to be

brought into general average, or to be a charge on the freight only?

2. If on freight only, whether: First. The plaintiff is entitled to recover the whole from the underwriters on freight; or, Second. Whether the underwriters on the vessel shall pay the whole; or, Third. Whether the plaintiff is to recover part from the underwriters on the freight, and the residue from the underwriters on the vessel.

3. If the latter is to be the result, then whether: First. The underwriters on the freight are to pay eight-ninths of the expenses for wages and provisions, and those on the ship the other ninth; or, Second. Are the underwriters on the freight to pay so much as accrued up to the twelfth of November, 1801, the day of abandonment, or the fourth day of September, the day of capture; and the underwriters on the vessel what was incurred from that day to the fourth of January, 1802, when the property was liberated; or, Third. What other rule of apportionment is to be adopted.

4. In calculating the general average, is the cost of the cargo here, or value at the port of destination, to be the sum on which the estimate is to be made?

LIVINGSTON, J., delivered the opinion of the court:

It is matter of surprise that questions which must frequently have occurred in so commercial a country as Great Britain, and where so large a capital is employed in insurance, have not been decided in any of her courts. We must therefore endeavor to discover what is reasonable and most conformable to the ancient laws and usages of other commercial nations; for where precedents are not to be found, the practice of such countries may be deemed the best guide on the subject of maritime law.

We are then first to determine, whether wages and provisions, during a detention after capture form a general average, or fall on the freight only? When it is considered that capture is a disaster which generally happens without fault of the owner of goods or vessel, but by superior force, against which no human precaution can always provide, and that the expenses here in dispute are incurred in consequence of this *vis major*, or *casus fortuitus*, and for the common benefit of all, it is not easy to assign a reason why they should be borne by one of the parties in misfortune rather than another. Of little advantage would it be to claim a valuable property, after capture, unless the mariners remained for the purpose of proceeding to the port of

discharge in case of liberation. It would otherwise, if acquitted, be exposed to perish, or be sold at great disadvantage. It was said on the argument that the master was not obliged to detain his crew. Whether it be compulsory on him to do so or not, is of no moment. It is sufficient that he has done it in the present case; that he has acted with good faith, and that such detention was manifestly for the general weal. It may well be doubted, however, whether it is not obligatory on him to keep them at least a reasonable time; for idle would it be, in many cases, to labor for a recovery of the property unless it could afterward be conveyed to its intended port. The cargo, in this case, might have been sacrificed in England, if the crew had been immediately discharged. Nor is it just, as respects this useful class of men, instantly to dismiss them in a foreign country after an accident of this kind, without affording them an opportunity of knowing the fate of the property, and a chance of defending and receiving their wages. At any rate, the objection comes awkwardly from any of those who have derived a certain benefit from the detention of this crew, without which there would probably have been a total instead of a partial loss. But without recurring to first principles, or searching for precedents, is it not matter of contract between the different classes of underwriters to regard expenses of this kind as a subject of general contribution? Every policy contains a clause that "in case of loss or misfortune, if it shall be necessary for the assured, his factors, servants, or assigns, to sue, labor and travel for, in and about the safeguard and recovery of the property," the several underwriters, "promise to contribute to the charge thereof according to the quantity of the sum by them insured." Now if a charge for extra wages and provisions be one, as it certainly is, which accrues in consequence of the labor and travel thus enjoined, and be absolutely necessary to give effect to such pursuit, the parties to the different insurances have consented to its being apportioned among them. In conformity with this stipulation is the practice of most of the commercial nations whose usages are known to us.

Ricard, who treats of the commerce of Amsterdam, and after him Beawes, in his *Lex Mercatoria*, says: "If a ship be taken by force, and carried into some port, and the men remain on board to take care of and reclaim her, the wages and expenses of the ship's company, during the arrest, shall be brought into general average: Page 150. For this rule the author just cited assigns this very obvious reason: "As the crew," says he, "re-

mained on board during an endeavor to reclaim her, these expenses were occasioned with the sole view of preserving the ship and cargo for their proprietors."

In England it is settled that if a ship be obliged to put into port to repair, and this be necessary for the safety of all, the charges of unloading, reloading, and taking care of the cargo, and also the wages and provisions of the workmen hired to repair her become a general average: *Da Costa v. Newnham*, 2 T. R. 407. The accident in the case of *Da Costa v. Newnham* had happened to the ship alone, and might, in some measure, have been owing to her feeble or impaired condition. It would have been more reasonable, therefore, that her owner, or underwriter, should have defrayed all these expenses himself than in cases where the peril falls at once as well on the goods as on the vessel, without room to impute fault or neglect to the owner of either. In such a case, then, it can hardly be doubted that the court of king's bench, to be consistent, would consider every consequential expense for the preservation of the whole a general average. In *Da Costa v. Newnham*, the crew having been dismissed before the vessel was repaired, it became unnecessary to decide by whom a charge for seamen's wages and provisions was to be borne.

In France, the extra wages of a crew, when a vessel puts into port, and remains there to avoid an enemy, are a gross average: 1 Emerig, 556. The same author informs us that all *bona fide* expenses to obtain the release of a vessel become a general average: *Vandenheuval v. United Ins. Co.*, 1 Johns. 406. If the property be released, and after quoting the same passage from Ricard, which has been cited from Beawes, he observes that in France the question has uniformly been thus decided whenever it occurred: *Id.* 631.

As we are of opinion, therefore, that the sums expended in this way during a detention which follows a capture are to be reimbursed ratably by all. The second question may be considered as also disposed of, and we will next see if in the present instance the underwriters on the freight are to pay eight-ninths of the sum assessed on that article, and those on the ship the other ninth, or whether the former are to pay such part as accrued before the abandonment, and the latter what arose between the abandonment and the time of her release?

According to a decision of this court in the case of *The United Ins. Co. v. Lenox*, the underwriters on the freight are entitled, in virtue of the abandonment, to all the Sophia's earnings

previous to her capture; that is, to eight-ninths, and those on the ship to the remaining ninth. Hence, a difficulty is supposed to occur to apportion the part of the average which falls on the freight among those two classes of assurers. The apportionment, although a little more complex, is nevertheless easily made. As all freight would probably have been lost in consequence of the capture, if the property had been condemned, the underwriters on freight and on vessel being severally entitled to eight-ninths and one-ninth thereof, such was the ratio of their respective interests in this subject while in admiralty. It, therefore, follows that in the same proportion should they contribute, as it respects the freight, to the expenses of reclaiming it, regardless as to how much had accrued antecedently, and how much subsequently to the day of abandonment. By a restoration of the property, the insurers on freight receive eight-ninths, and those on the vessel one-ninth. Nothing, therefore, can be clearer than that the expenses, as they relate to this article, must be defrayed by them in like proportion. The last point submitted respects the matter of calculating the average. Is it to be on the first cost of the cargo, or on its value abroad, and how are the vessel and freight to be appraised? It is difficult to adopt any rule sufficiently certain, and yet free of every exception.

In an average arising from jettisons, the English practice is to regulate the contribution by the clear price which the goods would have yielded at the port of destination, "it being equitable," says Abbott, "that the person whose loss has procured the arrival of the vessel should be placed in the same situation with those whose property has reached its port in safety:" Abbott, 262. If all the goods, as well those which arrive as those which have been cast into the sea, are to be estimated at their foreign value, the result will be nearly the same, provided there be an equal advance on all, as if the first cost be resorted to as the standard of their worth. I cannot perceive much force in the reason assigned by the learned author in favor of this mode. With regard to vessel and freight, various regulations have been established by different states as to the degree in which they shall be liable to contribute, which only show how impossible it is to find any rule that shall operate universally and with equal justice on the different persons concerned. In England, Marshall, following Molloy, and speaking of jettisons, says the ship contributes for her full value at her port of delivery, and the freight pays according to its value at the same place, after de-

ducting seamen's wages and certain other charges: Marshall, 467. I cannot subscribe to the equity of this mode of adjustment, as it relates to the vessel and freight. Pothier, in his treatise on Maritime Contracts, also exclaims against it. "As the freight," says he, "is only due to the owner of a vessel, as a kind of indemnity for her deterioration and expenses incurred by the voyage, it is subjecting him to a double burden to make him contribute for the entire value of the vessel and of the freight. Our ordinance, therefore, has adopted the middle course of making him contribute for one-half of the value of each:" Vol. II, n. 119, p. 411. Other states make the vessel contribute for half her value and one-third of her freight: Marshall, 467. As the rule is not accurately defined by the law of England, and the one adduced applied to cases of jettison only, we are at liberty to make one for ourselves. The injustice of making the ship and freight contribute for their full value has already been stated. The first will be injured by the voyage, and oftentimes the whole freight received will not be equal to the expenses and disbursements to which the owner has been exposed. Valuing the property at the port of discharge is also liable to difficulty and embarrassment. In many cases of a contribution, the vessel may not reach her port, which would have been the case here if she had been condemned; and if she does, the vessel is very rarely sold there, and some calculation must always be necessary to exhibit what are the net sales of the cargo. It will, therefore, be a rule less liable to objection, will suit the greatest number of cases, and not be affected by the fluctuations of markets or other contingencies, and certainly most easy of practice, always to value the goods at the invoice price, that is, at their first cost, without regard to their price abroad. What value to put on the vessel and freight, to do complete justice, is more difficult, perhaps impracticable. To take their full worth will not do. After the best reflection we have been able to bestow on the subject we are for valuing the vessel at four-fifths of her original cost, reckoning nothing for provisions or wages paid in advance; and the freight at one-half of the gross sum agreed to be paid. This rule may be deemed arbitrary; so will any other that can be devised; and yet, perhaps, it will come as near as any other in producing a contribution in proportion to the real interest of each which may be in jeopardy. It is seldom a vessel will sell for more, after a voyage, than four-fifths of what she cost; and, of course, the owner is not more than that a gainer by her being released; so neither will his freight clear to him more, if as much,

as one-half which is contracted to be paid. The same course of adjustment must be pursued between underwriters.

Upon the whole, therefore, our judgment is that the mariners' wages and provisions (*Penny & Scriber v. N. Y. Ins. Co.*, 3 Caines, 155), from the time of the *Sophia's* capture to the day of her leaving Ramsgate (it not appearing that she remained there unnecessarily after her liberation), be added to the other expenses of reclaiming the property; and that this aggregate sum be paid by the several underwriters on the vessel, cargo and freight. That in ascertaining the proportion or amount of their respective contributions, the cargo must be valued at its first cost and charges at the port of departure; the vessel at four-fifths of her actual value, at the same place, exclusive of outfits, and without regard to any valuation in the policy; and the freight at one-half of what was agreed to be paid at Havre. That the underwriters on freight pay eight-ninths of the sum which, on this calculation, shall fall on the freight; and those on the ship the whole of the contribution which shall belong to her, and also one-ninth of that which is to be borne by the freight; and those on the cargo the residue.

Judgment accordingly.

WAGES OF CREW AND PROVISIONS as subjects of general average are very much questioned. In *Spafford v. Dodge*, 14 Mass. 66, it was denied that these ought to be subjects of general average. Mr. Justice Jackson, giving the opinion of the court, said: "The necessary costs and charges incurred in claiming and obtaining the restoration of the ship and cargo are undoubtedly to be allowed as a general average. As to the wages and provisions of the crew, we are unable to see any ground on which we can allow them." Notwithstanding, Phillips in his work on Insurance, sec. 1332, says: "If the crew are detained during delay to claim a captured ship and cargo for the purpose of prosecuting the voyage on a decree for release, the expense of their wages and provisions during such detention is to be contributed for." And he prefers to agree with Livingston, J., in *Leavenworth v. Delafield*. And Parsons also concurs in this view. He says: "If a vessel be captured, the expenses incurred in efforts to recover the property, together with those necessarily caused by the delay, constitute a general average loss. If the crew are detained during a delay caused by such a necessity that the master may have his crew ready for prosecuting the voyage if his ship is released, this would raise a somewhat different question. Still we should be inclined to say that their wages and provisions should be contributed for in the same way and on the same ground as where a vessel is compelled by some extraordinary peril to seek a port of repair." Marine Insurance, pp. 259-262. See further, agreeing with this view: *Hurtin v. Phoenix Insurance Company*, 1 Wash. C. C. 400.

VALUE OF CARGO.—In regard to the mode of estimating the cargo, Sedgwick, in his work on Damages, p. 253, says: "It seems to be well settled in this country that the value of the cargo is to be arrived at by

taking the invoice prices instead of instituting any inquiry into the market value; and this also applies to cases of partial or total loss." In a note he says: "This was the rule laid in the case of *Leavenworth v. Delafield*, 1 Caines, 573, and has been acted on ever since. The principle has been recently somewhat shaken by Judge Betts in the District Court of the United States." *The Mutual Safety Insurance Company v. The George*, Olcott, 157, is the case referred to. In this case it was not decided what rule should be adopted in reference to the value of the cargo, the judge saying: "On the argument, the counsel on both sides agree to accept the invoice prices and bills of lading as proof of the true value of the cargo, and the policy as evidence of the value of the freight; and that agreement renders it unnecessary to inquire what effect in law those documents would be entitled to upon the question of actual value of the cargo at the time and place of its shipment, or of the freight at the time of loss." But it is evident, however, that had the question been presented, the court was not disposed to follow the decision of Livingston, J. The language of Parsons on this head is: "It is the general rule of all contributory maritime interests, that their contributory value is that which they have at the time and place where they are considered as finally saved. So far as the goods are concerned, this value is ascertainable in many ways. They may be sold at that place, and their net proceeds then determine their contributory value. If they are not sold there may be a known market value, and upon this is founded their contributory value. In the absence of these tests the invoice value is the foundation of the estimate, and this invoice value is generally taken for this purpose whenever the average is adjusted at some other port than the port of destination." *Marine Insurance*, p. 343. See *McLoon v. Cummings*, 73 Pa. St. 98, holding that the value of the cargo is that estimated at the port of destination, unless the voyage be interrupted by disaster; then its value will be that at the port of disaster.

VALUE OF SHIP AND FREIGHT.—The rule for estimating the value of the ship laid down by Livingston, J., is not approved by Judge Betts in *The Mutual S. Ins. Co. v. The George*. There it was decided that in adjusting and settling general average the contributory interest of the ship is to be estimated at her value at her port of departure, making reasonable allowance for wear and tear on the voyage, up to the time of the disaster. To determine this value it is said: "Usually the vessel is examined on the part of the underwriters by an experienced surveyor, having knowledge of her age, build and character, who will be watchful to prevent an overvaluation; and the strong interest of the owner and his agent, on the other hand, to have the policy a sufficient indemnity in case of loss, might in the conflict of these interests and views, secure an estimate sufficiently near the fair value to answer the purpose of a general rule, which would prevent serious injustice to either party. It is no more arbitrary to declare such valuation to be that on which the average shall be estimated than to direct one-fifth or one-half, 1 Caines, 573; Abbott, 356; 2 Valin, 294-5, to be deducted from the proved value at the commencement of the voyage to determine the worth of the vessel at the time of her destruction." This case is more important as it was cited and its doctrine approved in *The Star of Hope*, 9 Wall. 203, in the opinion by Mr. Justice Clifford. An exception was taken in that case to an estimate by the commissioner based on the value of the ship as stated in the policy. The court say: "Strictly speaking, the rule is the value of the ship antecedent to the injuries received, but as that requirement can seldom be met the usual resort is her

value at the port of departure, making such deduction for deterioration as appears to be just and reasonable. No proofs on that subject, except the policy of insurance, was offered by either party, and inasmuch as ships are seldom insured beyond their actual value the exception is overruled." Noticing the principal case, Sedgwick says: "In New York, to arrive at the value of the vessel, one-fifth of its value at the time of sailing is deducted, and the freight contributes on one-half, and is contributed for on the whole. And this principle of arbitrary valuation, though the rate or proportion may differ, prevails, we believe, universally throughout the United States." *Damages*, p. 253.

WILLIAMS v. SMITH.

[2 CALDER, 1.]

WHAT CONSTITUTES A BLOCKADE.—To constitute a blockade, as affecting a policy of insurance, there must be an actual existing force before the port at the time it is entered. The *animus revertendi* of the blockading fleet does not continue the blockade, nor is the entry of a neutral, after being notified, a breach of his neutrality, if the blockading force be not before the port.

WHAT CONSIDERED A LOSS WITHIN POLICY.—If a vessel be obliged to put into port from necessity, and a pestilential disorder break out which disables her crew and renders it impossible for her to pursue her voyage, it is a loss within the perils of a policy.

MOTION for a new trial. The action was on a valued policy on the ship *Prosper* from New York to Algiers, with liberty to touch at Cadiz. The premium was fifteen per cent., with the usual clause against contraband, but in the margin was written "on naval stores."

The leading facts of the case were: The vessel sailed on the twentieth of May, 1800, with a cargo principally of naval stores. From the thirteenth to the sixteenth of June following she experienced very severe weather, in consequence of which she suffered serious damage. On the third of July the *Prosper* was boarded off Cadiz, according to the testimony of the mate, by a British seventy-four; but according to that of two others, by a frigate, who indorsed her papers, and warned her not to enter Cadiz, as it was blockaded. On the fifth, by reason of damage, the captain, after consultation with the mate, determined to bear away for Cadiz, in order to insure the safety of his vessel and crew. They arrived the same day at Cadiz, though the wind could have taken them to the sea-ports of St. Lucar's and St. Mary's, a few miles distant from Cadiz. It appeared that the blockading force before Cadiz had left in pursuit of a French fleet, leaving, however, three of four frigates to continue the blockade, a force sufficient to render

the entrance hazardous to merchant vessels, though the Spanish armament then in Cadiz consisted of twenty or thirty sail of the line. Notwithstanding this, from the evidence of a witness who had, about the middle of July, been warned by one of those frigates not to enter Cadiz, there was presumption that even then the British squadron was at Gibraltar, about fourteen leagues distant; and on an appearance of attack from the British ships the Prosper was herself, while at Cadiz, ordered further up the harbor.

From a survey made on the sixteenth of July, at the request of the captain, it was certified that the ship, from her leaky state, wanted repairs, and therefore it would be necessary for her to be sent to a proper place to unload her cargo. In consequence of this, more than half of her lading was taken out, and the vessel moved up to Putnall, the usual place for repairing. Whilst there, a species of epidemic fever broke out, which prevented all business, and caused even the custom-house to be shut up. The captain, to more readily get away, after the repairs had been made, dropped down to Cadiz, but was on the fourteenth of October, in a tremendous storm, obliged to cut his cables, and drive to sea. He was not able to return to Cadiz until the twenty-fourth, on account of violent storms, and then after a survey it appeared that the cargo both on shore and on board, by reason of the heat of the climate and the violence of the gale, was deteriorated more than one-half of its original value. It was also in evidence that the whole would not have produced enough to outfit and repair the ship for the completion of her voyage, her provisions and stores having been expended in the maintenance of her crew. To obtain money on bottomry was impossible. On the fifteenth of November, Williams, the plaintiff, formally abandoned the vessel and cargo to the underwriters, and made a regular entry of it in the office of the consul for the United States. On the twenty-ninth the Prosper was attached for money due on a bottomry bond. Under this attachment the vessel was sold for one thousand nine hundred and twenty-five dollars, while her price by the bill of sale was three thousand and five hundred dollars, the amount of the bottomry bond being six thousand and five hundred dollars. The crew consisted of the master, mate, four hands, a cook and a boy, a sufficient force for American ship as it appeared, though considered inadequate generally.

The judge before whom the case was tried charged:

1. That if the jury were of opinion Cadiz was blockaded by a

competent force, and the ship not forced from necessity to enter that port, and nevertheless did enter it after notice, the verdict must be for the defendant;

2. That if they were of opinion the crew was not competent for the voyage, they would find in the same manner;

3. That if the seizure under the bottomry bond was made before the abandonment of Cadiz, the defendant would also be entitled to a verdict; but if the abandonment was previous to the seizure, the plaintiff would have a right to recover for a total loss;

4. That if the cargo was injured exceeding a moiety of its value at the time of abandonment, the right of the plaintiff would be the same;

5. That any damages which arose in consequence of the fever at Cadiz, were within the perils of the policy;

6. That if the jury should find in favor of the defendant, on either of the two first points, it would be sufficient, and in that case it would be unnecessary to examine the other points submitted to them.

The jury brought in a verdict for a total loss, voluntarily assigning the following reasons for their finding:

1. That they considered the port of Cadiz as partially blockaded, and that the going into that place was therefore justifiable, especially as the blockade was well known in New York before the *Prosper* left that port;

2. That they considered the crew was competent, the vessel having arrived in safety; but they did not say, nor did the judge understand them to mean, that they founded their verdict on this point upon that reason alone;

3. That the cargo was damaged, exceeding a moiety of its value, at the time of its abandonment;

4. That the seizure of the vessel having taken place subsequent to the abandonment, they did not consider it as affecting the plaintiff's right.

Bogert, for defendant.

Hamilton & Riggs, contra.

KENT, J., delivered the opinion of the court. A motion is made on the part of the defendants for a new trial:

1. Because Cadiz was blockaded, and the ship went in without necessity;

2. Because the fever is not a peril within the policy;

3. Because at any rate the plaintiffs are only entitled to recover as for a partial loss.

On the first point, we are of opinion, that on the fifth of July, when the ship entered the port of Cadiz, that port was not blockaded. There was no naval investment of the port; there were no ships there, so as to render it hazardous to enter. The blockade had in fact been raised a few days before, in consequence of a naval expedition; and it is sufficient for a neutral, when he arrives off a port, to find it clear of any blockading force. He can only judge from what appears, and if he finds no blockade existing *de facto*, it is sufficient. He is not bound to inquire or wait for events, and see whether the blockade that once existed is finally raised, or whether the blockading squadron still retains the *animus revertendi*. The neutral has no means of knowing when a blockade exists in contemplation of law, as contradistinguished from a blockade in fact; and to impose that knowledge upon him at his peril, would be most unreasonable. The only practicable rule is, that there must be an actual existing blockade, to render it unlawful for the neutral to enter.

The notice that the plaintiff received from a British frigate, or a British ship of the line at sea, several leagues from the port, and some days before the entry, amounted to nothing, if in fact there was no blockade of Cadiz when he arrived there. It is absurd to suppose that that ship or frigate, in the situation it was, constituted a blockade of Cadiz, nor is it to be understood that the commander of the ship made any such pretension. The plaintiff, therefore, committed no violation of his neutrality in entering Cadiz, and he had liberty to touch there by the terms of the policy.

On the second point, we are satisfied that the damage resulting from the pestilence at Cadiz is covered by the policy. It is not requisite to decide absolutely whether a pestilence is a peril direct within the policy. It formed, however, a sound excuse for delay at Cadiz, and if the consequence of that delay was a deterioration of the subject insured, the insurer must be answerable for the loss.

And with respect to the amount of the damage, we see no reason to complain of the finding of the jury, that it amounted to above one-half, and justified the abandonment of the voyage. The weight of evidence on this point is in favor of the verdict, and there is no fault or neglect imputable to the plaintiff. There was a series of misfortunes, which the captain appears to

have made constant and sincere, but unavailing efforts to surmount, and we are perfectly satisfied that the verdict is just, and consequently that the defendants take nothing by their motion.

New trial refused.

As to a blockade, Kent, noticing this case, among others (1 Com. 146), says: "The occasional absence of the blockading squadron, produced by accident, as in case of a storm, and when the station is resumed with due diligence, does not suspend the blockade, provided the suspension and the reason of it be known, and the law considers an attempt of such an accidental removal as an attempt to break the blockade, and as a mere fraud. The American government seemed disposed to admit the continuance of the blockade in such a case, and the language of the judicial authorities in New York has been in favor of the solidity and justness of the English doctrine of blockade on this point. But if the blockade be raised by the enemy, or by applying the naval force, or part of it, though only for a time, to other objects, or by the mere remissness of the cruisers, the commerce of neutrals to the place ought to be free. The presence of a sufficient force is the natural criterion by which the neutral is enabled to ascertain the existence of the blockade."

HENDRICKS v. JUDAH.

[2 CAINES, 25.]

DISCHARGE OF BANKRUPT—AGAINST WHAT DEMAND NO BAR.—If a house had been leased for a year before an act of bankruptcy, and the bankrupt continue in possession thereof afterward, his certificate of discharge will be no bar to an action for the subsequent rent.

ACTION on the case for the use and occupation of a house. One count stated a parol agreement by the defendant with the plaintiff to lease a house, which the defendant afterward refused to occupy or pay rent for. The other count was for money paid, laid out and expended to the use of defendant. A verdict having been rendered by the plaintiff, the question as to his right to recover was reserved for the opinion of the court on a case briefly stated as follows:

The defendant applied to a Mrs. Bowne to rent him a house from the first of May, 1800, to the first of May following. She refused; but said she would let it to the plaintiff, who might underlet it to the defendant. This was accordingly done. In September, 1800, the defendant became a bankrupt, and duly obtained his certificate, but the plaintiff never took the house off his hands, though it was for the most part unoccupied, and had, by the courtesy of the defendant, been in some degree occupied by the plaintiff, who paid to Mrs. Bowne the rent for the

three-quarters due after the bankruptcy. To recover this rent the present suit was instituted, and the sole point was whether the bankruptcy in September, and the certificate, was a discharge from the subsequent rent.

Riggs, for the plaintiff, considered the plaintiff as surety for the defendant; and in this point of view the cause of action was subsequent to the discharge. But taking it simply as a transaction between landlord and tenant, no obligation arises on the part of the latter until the rent becomes due; therefore the certificate did not constitute a bar. If the rent were quarterly, the debt matured at the expiration of each quarter; if annually, at the end of the year. This principle will be found stated in Cullen's Bankrupt Law, 126; *Mills v. Auriol*, 1 H. Bl. 433 (1 Smith's L. C. 910); and *Naish v. Tallock*, 2 H. Bl. 319. The tendency of the cases is to settle this point, as between landlord and tenant, because a demand for rent, which was not payable antecedent to bankruptcy, cannot be proved under the commission. If, therefore, it cannot be proved, it cannot be barred, and the bankrupt continues liable notwithstanding his certificate, which has only a retrospective and not a prospective view.

Troup, for defendant, stated it was settled that to an action of debt on a lease, brought after a bankruptcy, for rent subsequently accrued, the certificate is a bar, and even if it be on the implied covenant in the *reddendum*. A distinction, however, has been taken in the English books, where the suit is on an express covenant to pay, in which case it is said the discharge will be no bar: 1 Saund. 241; 4 D. & E. 94; 1 H. Bl. 433. The reasoning, however, on which the rule is established in the first cases, would equally apply to the last; for the bankrupt is as much divested of the possession in this as in the others.

LIVINGSTON, J., delivered the opinion of the court:

The only ground on which a certificated bankrupt can expect to be exonerated from a demand of this kind, is the hardship of continuing liable after a surrender of all his estate, and among the rest this very property, to assignees for the benefit of all his creditors; but is this the fact? It does not appear by the case. We well know that a house of this kind, on so short a lease, is not worth more than the rent reserved, and (notwithstanding the generality of the assignment) is not taken possession of by the assignees. It continues in the bankrupt's occupation, and if so, as we must presume was the case here, such

being the usual course of things, and the contrary not being found, upon what pretense can he ask an exemption from this suit? He, and not his creditors, have derived a benefit from this property since his bankruptcy. Therefore he, and not the estate assigned, should be burdened with the rent. *Qui sentit commodum, sentire debet et onus.*

It may be subjoined that the debt being contingent (for in case of eviction nothing would have been due), proof of it would not have been admitted under the commission, and, therefore, unless there remain a liability in the defendant, the plaintiff will be without remedy: Cullen Bank. L. 84-126; 3 D. & E. 544. We mean, however, to be understood as determining this cause, more particularly on the ground of the defendant's occupying the premises after his discharge than on any other, and of the total want of proof that the assignees ever took possession of them. Judgment must be entered on the verdict, as found by the jury.

The case of *Mills v. Auriol*, cited in the argument of counsel for the plaintiff, is given as one of Smith's Leading Cases. In this case it was decided that the bankruptcy of the defendant cannot be pleaded in bar to an action of covenant for rent. The American editors of Smith's Leading Cases, on this point remark: "Whatever difference may exist on this point, it is generally conceded, that until the assignees elect to take the term, it will remain in the lessee with all the attendant rights and obligations: *Copeland v. Stephens*, 1 B. & Ad. 593; *Hendricks v. Judah*, 2 Caines, 25; *Sparhawk v. Broome*, 6 Binn. 253; and it is equally well settled in accordance with the principal case (*Mills v. Auriol*) that even when the term is accepted by the assignees, and vests in them by operation of law, the lessee will still be bound by an express covenant to pay the rent, or perform any other duty imposed in terms by the lease: *Wall v. Hurds*, 4 Gray, 256; *Fisher v. Milliken*, 8 Barr, 111, 120. This results from the general principle that the passage of a covenant running with land to an assignee will not discharge or vary the obligation of the original covenantor."

SEIXAS v. WOODS.

[2 CAINES, 48.]

WARRANTY NOT IMPLIED IN SALE OF GOODS.—In an action on the case for selling one article for another, there must be either an express warranty or fraud on the part of the vendor. A sound price does not imply a warranty of soundness, nor does a description of goods in a bill of parcels amount to a warranty.

ACTION on the case for selling peachum wood for braziletto; the former being almost worthless, the latter of considerable

value. The defendant received the wood from a house in New Providence, whose agent he was, and the invoice described it as brazilletto. He advertised it as such, had shown the invoice to the plaintiff, and had the bill made out for brazilletto. But it was not pretended that he knew that it was peachum, nor did the plaintiff suspect it to be such, as it was delivered from the vessel, and picked out from other wood by a person on behalf of the plaintiff. In fact, either party was ignorant that the wood was other than brazilletto, nor was any fraud imputed. On discovery of the real quality of the wood, it was tendered back to the defendant, and a return of the purchase money demanded. On his refusal, he having remitted the proceeds to his principal, the present action was brought, and a verdict was given for the plaintiffs, subject to the opinion of the court.

Hoffman, for plaintiff, stated the simple point to be, whether the party, being an agent, was liable. If the credit be given to the agent, he will be liable, but not if given to the principal. *Macbeath v. Haldiman*, 1 T. R. 181, shows an agent may make himself responsible on his contract.

The bill of parcels is complete evidence that the sale was made by the defendant in his own name, and not on account of his principal. Having paid over the money is no defense. In *Buller v. Harrison*, Cowp. 566, the money was paid by mistake.

The description of the wood in the bill was a full warranty of its quality. To show the personal liability of the defendant, he cited *Gonsalez v. Sladen*, Bull, N. P. 130.

Woods and Harrison, contra. The remittance is a fact of importance. Unless there be a warranty, *scienter* or fraud must be shown; and there could be no warranty, unless the mere representation of calling brazilletto be considered one. But as to this, the plaintiff could judge as well as the defendant. Not every assertion or representation will amount to a warranty: *Pasley v. Freeman*, 3 T. R. 57. *Scienter* must be shown: *Springwell v. Allen*, Aleyn, 91; *Dewding v. Mortimer*, 2 East, 452; *Leakins v. Clissel*, 1 Sid. 146; S. C. 1 Keb. 522. The contents of a bill of parcels are never conclusive: 12 Vin. 6 E. The action ought to be against the principal, unless in cases of *mala fides* or notice: *Sadler v. Evans*, 4 Burr. 1986. The maxim of *caveat emptor* applies to this case: *Parkinson v. Lea*, 2 East, 314. The seller of a parcel of hops, with a latent defect, which he did not know of, and without warranty or fraud, was not liable, though the hops turn out unmerchantable.

THOMPSON, J. Two questions arising out of this case are presented for consideration:

1. Whether an action can be maintained to recover back the consideration money, paid under the circumstances stated in the case? and, if so, then

2. Whether the defendant, who acted only as agent or factor, can be made responsible?

From the fact stated with respect to the first point, it appears that there was no express warranty by the defendant, or any fraud in the sale. The wood was sold and purchased as brazilletto wood, and a fair price paid for such wood, when in fact the wood was of a different quality, and of little or no value. The plaintiff's agent, who made the purchase, saw the wood when unloaded and delivered, and did not discover or know that it was of a different quality from that described in the bill of parcels; neither did the defendant, who was only consignee of this cargo, know that the wood was not brazilletto. The question then arises, whether there was an implied warranty so as to afford redress to the plaintiffs, or whether the maxim of *caveat emptor* must be applied to them. From an examination of decisions in courts of common law, I can find no case where an action has been sustained under similar circumstances; an express warranty, or some fraud in the sale, are deemed indispensably necessary to be shown. In the case of *Chandelor v. Lopus*, 2 Cr. Rep. 4, in the exchequer chamber, it was decided that an action of trespass on the case would not lie, for selling a jewel, affirming it to be a bezoar stone, when in truth it was not, unless it be alleged that the defendant knew it was not a bezoar, or he warranted it to be such, and in the case of *Springwell v. Allen*, 2 East, 448 n, it was adjudged that the *scienter* of fraud was the gist of the action. Mr. Wooddeson, in his Lectures (2 Wood. Lect. 415), says: In the English law, relating to this subject, a very unconscientious maxim seems long to have prevailed, which was expressed or alluded to by the words *caveat emptor*, signifying that it was the business of the buyer to be upon his guard, and that he must abide the loss of an imprudent purchase, unless the goodness and soundness of the thing sold be warranted by the seller. But this doctrine, he says, is now exploded, and a more reasonable principle has succeeded, that a fair price implies a warranty; and that a man is not supposed, in the contract of sale, to part with his money without expecting an adequate compensation.

Here we find a full and complete recognition by this com-

mentator that the law once was laid down in the above cases; and the modern and improved doctrine, as he calls it, however reasonable and just it may at first seem, does not appear to be fortified and sanctioned by adjudged cases. They all determine either that there must be an express warranty or some fraud on the part of the vendor. In the case of *Bree v. Holbech*, Doug. 655, *assumpsit* was brought to recover back money paid as the consideration for the assignment of a mortgage which turned out to be a forgery. The defendant being an administrator with the will annexed, and finding the mortgage among the papers of the testator, assigned it *bona fide*, not knowing it to be a forgery; and it was adjudged that he was not liable to refund, he having acted in good faith; and there being no covenant for the goodness of the title, that it was incumbent on the plaintiff to have looked to the goodness of it. And in the case of *Stewart v. Wilkins*, Doug. 18, it was ruled that *assumpsit* was the proper form of action where there is an express warranty, and Lord Mansfield there said that selling for a sound price, without warranty, may be a ground for *assumpsit*; but in such case it ought to be laid that the defendant knew of the unsoundness: 2 East, 446. Again in the case of *Williamson v. Allison*, the same subject in some measure came under review; and the law, as laid down in the cases of *Springwell v. Allen*, and *Chandelor v. Lopus*, above cited, was fully recognized. Fonblanque, in his valuable Treatise on Equity (1 Fonb. 360 h), speaking of the justice and propriety of this principle, says: "To excite that diligence which is necessary to guard against imposition, and to secure that good faith which is necessary to justify a certain degree of confidence, is essential to the intercourse of society. These objects are attained by those rules of law which require the purchaser to apply his attention to those particulars which may be supposed to be within the reach of his observation and judgment; and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. If the purchaser be wanting in good faith to those points, where attention would have been sufficient to protect him from surprise and imposition, the maxim *caveat emptor* ought to apply. But even against this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting in good faith, *fides servanda* is the rule of law, and may be enforced both at equity and at law."

These observations, I think, apply with peculiar force to the case before us. The agent of the plaintiff who made the purchase, was present at the delivery of the wood; and the defect now complained of was within the reach of his observation and judgment, had he bestowed proper attention. I am satisfied that according to the settled decisions in the English courts, either an express warranty or some fraud or deceit on the part of the vendor is necessary to be shown in order to entitle the purchaser to the remedy sought after in the present case. I see no injustice or inconvenience resulting from this doctrine, but, on the contrary, think it best calculated to excite that caution and attention which all prudent men ought to observe in making their contracts. I am therefore of opinion with the defendant, on the first point, which renders it unnecessary for me to examine the other point raised on the argument.

KENT, J. This is a clear case for the defendant. If upon a sale there be neither a warranty nor deceit the purchaser purchases at his peril. This seems to have been the ancient and the uniform language of the English law; and the only writer of authority that calls this doctrine in question is Professor Wooddeson in his Vinerian Lectures, and he does not cite any judicial decision as the basis of his opinion. In the case of *Chandelor v. Lopus*, Cro. Jac. 4, it was determined in the exchequer by all the judges except one, that for selling a jewel which was affirmed to be a bezoar stone when it was not, no action lay, unless the defendant knew it was not a bezoar stone or had warranted it to be one. This appears to be a case in point and decisive. And in the case of *Parkinson v. Lee*, 2 East, 314, it was decided that a fair merchantable price did not raise an implied warranty; that if there be no warranty and the seller sell the thing such as he believes it to be, without fraud, he will not be liable for a latent defect. These decisions are two centuries apart, and the intermediate cases are to the same effect: Co. Litt. 102a; Cro. Jac. 197; 1 Sid. 146; Yelv. 21; 2 Ld. Raym. 1121, per Holt, C. J.; Doug. 20; Aleyn, 91, cited 2 East, 498, *notis*. By the civil law, says Lord Coke, every man is bound to warn the thing that he selleth, albeit there be no express warranty; but the common law bindeth him not, unless there be a warranty in deed or law. So Fitzherbert, N. B. 94 C., says: that if a man sell wine that is corrupted, or a horse that is diseased, and there be no warranty, it is at the buyer's peril, and his eyes and his taste ought to be his judges in that case. In the case cited from 2 East, the judges were unani-

mous that the rule applied to sales of all kinds of commodities. That without a warranty by the seller, or fraud on his part, the buyer must stand to all losses arising from latent defects, and that there is no instance in the English law of a contrary rule being laid down. The civil law and the law of those countries which have adopted the civil as their common law are more rigorous toward the seller, and make him responsible in every case for a latent defect (see the Dig. Lib. 1, tit. 2, C. 13, N. 1, which gives the very case of selling vitiated wood), and if the question was *res integra* in our law, I confess I should be overcome by the reasoning of the civilians. And yet the rule of the common law has been well and ably vindicated by Fonblanque, as most happily reconciling the claims of convenience with the duties of good faith. It requires the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment, and the vendor to communicate those particulars and defects which cannot be supposed to be immediately within the reach of such attention. And even against his want of vigilance the purchaser may provide by requiring the vendor expressly to warrant the article. The mentioning the wood as braziletto wood in the bill of parcels and in the advertisement some days previous to the sale, did not amount to a warranty to the plaintiffs. To make an affirmation at the time of the sale a warranty, it must appear by evidence to be so intended; Buller, J., 3 T. R. 57; Carth. 90; Salk. 210; and not to have been a mere matter of judgment and opinion, and of which the defendant had no particular knowledge. Here it is admitted the defendant was equally ignorant with the plaintiffs, and could have had no such intention. The cases in which the ship, in a policy of insurance, has been described as neutral or American, and that description held to be a warranty, are not at all analogous to the present case. The policy is a special contract in which the whole agreement is precisely cited, and no question was ever made in those cases but that the assured knew and intended to be understood to mean that the vessel was of the character described. I am, therefore, for the defendant.

LEWIS, C. J., dissented.

Judgment for defendant.

The case of *Chandelor v. Lopus*, relied on so much by the judges, is one of Smith's Leading Cases. See the note to that case, where the American editors ably review the law on this subject. The editors say: "The strongest

cases against the doctrine of implied warranty to be found in the range of American decisions are perhaps those of *Seixas v. Woods*, 2 Caines, 48; *Holden v. Dakin*, 4 Johns. 421; and *Swett v. Colgate*, 20 Id. 196. * * * These decisions were followed in the case of *Hotchkiss v. Gage*, 26 Barb. 141, and said to have placed the law of New York on a basis which was still unshaken, and should be adhered to whenever the sale of specific chattels was in question:" 1 Smith's L. C. 310, 7th Am. ed.

The court of appeals in New York has, however, somewhat modified the decision of *Seixas v. Woods*. In *Hawkins v. Pemberton*, 51 N. Y. 198, it is held that in order to constitute a warranty upon a sale, it is not necessary that the representation should have been intended by the vendor as a warranty. If the representation is clear and positive, not a mere expression of opinion, and the vendee understands it as a warranty, and relying upon it purchases, the vendor cannot escape liability by claiming that he did not intend what his language declared; and there is no distinction in principle between a representation as to the quality and condition of an article and one as to its character; what would amount to a warranty in the one case is a warranty in the other. Earl, J., referring to the principal case, says: "The case of *Seixas v. Woods*, seems to have been decided mainly upon the authority of the case of *Chandelor v. Lopus*. That was an action on the case for selling peachum wood for brazilletto; the former worth hardly anything, the latter of considerable value. The defendant advertised the wood as brazilletto wood, showed plaintiffs the invoice in which it was so described, and billed it to the plaintiffs as such. The plaintiffs had a verdict, subject to the opinion of the court; and the court held that was no express warranty, and that the defendant was not, therefore, liable. There was no intimation in the opinion delivered that there was any difference between a warranty as to the character of an article sold, and a warranty as to its condition and quality. The court simply held that the representations on the part of the defendant did not amount to an express warranty. They were laying down broadly the common law doctrine of *caveat emptor*, and combating the implied warranties of the civil law. Hence great strength was laid upon the requirement of an express warranty. The rule, as thus laid down, has been thoroughly overturned since the courts hold that any positive affirmation or representation as to the character or quality of an article sold may constitute a warranty. The case has been much questioned, and can no longer be regarded as authority for the precise point decided: 2 Kent's Com. 633; *Stone v. Denny*, 4 Met. 151; *Henshaw v. Robins*, 9 Id. 83, 89; *Binnard v. Spring*, 42 Barb. 470; *Hart v. Wright*, 17 Wend. 267, 271; *Bonekins v. Bevin*, 3 Serg. & R. 37. The case holds that a vendor is liable upon an express warranty of the character of the article sold; and the more recent cases hold that a positive affirmation, understood and relied upon as such by the vendee, is an express warranty * * * * The cases of *Seixas v. Woods*, and of *Swett v. Colgate*, have been frequently cited in our courts, and have doubtless influenced, and it may be controlled, the decisions in other cases. The propositions of law announced in them are sufficiently correct; but in view of the rules of law as now settled in this and other states, I am of opinion that the law was not properly applied to the facts appearing in those cases." In the recent case of *Dounce v. Dow*, 64 N. Y. 411, the doctrine of *Hawkins v. Pemberton* was affirmed, and Church, C. J., referred to it as modifying to some extent the earlier decisions of *Seixas v. Woods* and *Swett v. Colgate*.

STEWART v. EDEN.

[2 CASES, 121.]

PLEADING PRESENTMENT FOR PAYMENT.—Where a maker of a note cannot be found when it is due, evidence of that fact is sufficient to support the general allegation that the note was presented and payment refused.

NOTICE TO INDORSER.—If the indorser of a note made and dated in New York have a house there, and also one at a short distance in the country, notice of non-payment left at his house in New York is good.

RELEASE OF ONE JOINT MAKER.—If a holder of a note release one of several joint-makers, at the same time excepting any liability such maker may have to the indorsers, those indorsers cannot, in an action against them by the holder, set up such release as a discharge.

ALLEGING PROMISE BY DECEASED INDORSER.—If the indorser of a note die before it falls due, and the holder, in an action against the executors, allege that the indorser promised to pay, in his life-time, it is fatal, and on such a count no recovery can be had.

ACTION against the executrix and executors of the payee indorser by the indorsees of a promissory note made in New York by Waring and Medcalf Eden, one of the defendants.

The declaration stated a demand on the makers, their refusal, notice to the deceased in his life-time, his liability and assumption to pay. To this were pleaded *plene administraverunt* and *non-assumpserunt*; on the latter, issue was joined; and to the latter the plaintiffs replied that they had not fully administrated. The several signatures were admitted, and the plaintiffs, to show a demand on the makers, gave in evidence that the note was, on the eighth of November, 1798, when due, presented at the store of the makers, and no one being in, the person who demanded payment went into an upper room, where he was told that Waring and Eden were out of town, and that a young man opposite was their clerk. The note was thereupon presented to him, but he denied having authority or received instructions to pay. Next day, a notice in the usual form was carried to the dwelling of Medcalf Eden, the indorser, but the house was found closed, and on this the bearer of the notice rolled it up and put it into the keyhole of the outer door. It was admitted that the deceased, Medcalf Eden, shortly after making the note, retired to his country seat, four miles from the city of New York, where he died on the thirteenth of September, 1798; that the will under which the defendants acted was not proved until the nineteenth of December, 1798, before which time the plaintiffs were not informed of any will, or who were executors; and that one of the defendants, Martha, had

never intermeddled with the affairs of the deceased, though sufficient had been left at his country seat to pay the bill, but this property had been sold under executions against the other executors, for debt due from them in their own behalf. It appeared that the plaintiffs, on the seventeenth of June, 1801, executed to Henry Waring, one of the makers of the note on which the present action was founded, an instrument, in which, after reciting the note, the following discharge was contained:

“In consideration of one dollar, to us paid by Henry Waring, we do hereby absolutely release and discharge him from all claims, suits and demands which we have against him on account of the note of which the above is a copy, excepting always that he shall be responsible to the executors and executrix of Medcalf Eden, deceased, and to them only, we guaranteeing him against any suits to be brought on the same by any other person or persons obtaining the note in any way, except from the executors and executrix, and this release or discharge shall not be construed to affect our claim, in any manner, against the said executors and executrix.

(Signed,)

“R. & H. STEWART.”

On the trial, the defendant's counsel made the following points:

1. That the evidence, as adduced by the plaintiffs, did not support their declaration, because it is in that stated that at the time the note became due, it was shown and presented to the makers, and payment demanded of them; whereas the testimony was that they were not to be found, and therefore there is a variance;

2. That the count states notice of non-payment, given to the indorser, by reason whereof he became liable to pay, assumed and refused, which could not be, as the indorser died before the note was due;

3. That the discharge and release to Henry Waring, one of the makers, was an exoneration in law of the indorser, and consequently of his executors;

4. That notice of non-payment ought to have been at the country house of the indorser;

5. That as Martha Eden, the executrix, never intermeddled with the estate of the testator, against her judgment *de bonis testatoris* only ought to be entered, and not against her personally.

It was, however, agreed that a verdict should be taken for the plaintiffs; but that if the opinion of the court should be

in favor of the defendants, upon either of the first or second points, a nonsuit to be entered; if for them on the third and fourth points, the defendants to have the verdict entered for them; and if, on the testimony as admitted, the court should think there was no evidence to charge the defendant, Martha Eden, personally, then the judgment to be *de bonis testatoris*.

Hamilton and Ricker, for plaintiff. A demand at residence is sufficient: *Kyd*, 88; *Chitty*, 99. In *Saunderson v. Judge*, 2 H. Bl. 511, it is said by the court: "It is not necessary that a demand should be personal; it is sufficient if it be made at the house of the maker." On the second objection it was admitted the indorser died before the bill was due; but as the assumption of an indorser is only a conclusion of law, it need not be proved. If the drawee be dead, it is conceded presentment should be made to his representatives, and the same applies to the case of an indorser. But this is in case the representative lives at a reasonable distance: *Chitty*, 71. If there is no executor, then notice at the residence of the deceased will suffice: *Chitty*, 131, 132.

As to the third point, it is well established that there must be an actual satisfaction of a bill or note by the maker or drawee in order to discharge the parties previous to the holder: *Hayling v. Mulhall*, 2 H. Bl. 1235; *Bayley*, 87, 88; *Chitty*, 182, 183. The only reason why a composition with a maker or drawer releases the indorsers, is because it takes away the remedy of the holder: *Ex parte Smith*, 3 Bro. Ch. 1. On the last point, if the defendant, Martha Eden, had a good defense, it ought to have been pleaded separately: *Middleton v. Price*, 1 Wils. 17; *Philip v. Biron*, 1 Str. 509.

Woods and Harison, for defendant, stated that the case cited from H. Blackstone mentions the declaration to have been in the usual form; the one now before the court is not so: 1 Went. Plead. 307, where the words *non fuit inventus* are used. The principle is particularly laid down in *Rushton v. Aspinall*, Doug. 654, 680. A promise to a testator will not be maintained by showing a promise to his executors: *Dean v. Crane*, 1 Salk. 28. The fourth point speaks for itself; notice should have been given at the residence of the indorser, but our principal reliance is on the release; a part payment from the maker of a note was held a discharge of the indorser: *Kellock v. Robinson*, 2 Str. 745. On the fifth point, the strict rule of practice may be against the defendant; but, as it is evident on the face of

the case that the *devastavit* was not by Martha Eden, perhaps judgment, if any judgment against the defendants, ought, as to her, to be only *de bonis testatoris*, for the *devastavit* of one executor is not the *devastavit* of another: Toller's Law of Exrs. 342.

By Court, LIVINGSTON, J. If the maker, when a note falls due, cannot be found, nor payment demanded of him personally, should not the declaration state the fact specially, instead of averring generally, "that the note was presented and payment refused?" This is the first question made in this cause. It is agreed that the plaintiffs might have stated what particular diligence they used, in lieu of alleging, as they have done, that the note was "presented to the maker, and by him dishonored;" but it has been most usual to pursue the latter course, and no good reason can be assigned for departing from it. Under an averment of the notes being presented, the party has hitherto been permitted to give evidence of any diligence which is deemed equivalent to an actual presentation of it to the maker. Precedents are generally this way, and if in some, the whole matter intended to be insisted on as evidence of a demand be set forth, it only proves that either form is good. In *Saunderson et al. v. Judge*, 2 H. Bl. 510, the declaration stated that "the note was presented to the maker for payment." No demand had, however, been made of him, for he had absconded, and could not be found. The judge, therefore, nonsuited the plaintiffs, supposing an actual demand necessary. This nonsuit was set aside, although it was contended, as here, that the plaintiffs having averred that the note was presented to the maker in person, ought to have been held to proof of that fact. The court disregarded this objection, and recognized the principle that due diligence in the holder to obtain payment, without an actual demand, is good evidence to support such averment. It is true, that in Bayley on Bills, 110, it is said, "that if a note be alleged to be presented and payment refused, evidence cannot be given of the makers not being found;" but this is a decision at *nisi prius*, on which it would be capricious to alter a practice of declaring, which has been pretty uniformly followed since the introduction into general use of bills of exchange and promissory notes. The case of *Starke v. Cheesman*, from Carthew, so much relied on by defendants, proves nothing more than that it is sufficient to aver that the drawer of a bill was not found, without stating that inquiry had been made after him, and that such form of declaring is good. This is not disputed; but it

does not follow that no other form will do. My opinion, therefore, is that the present averment was sufficiently supported by testimony that the makers, on inquiry at their store, could not be found; and that payment was, therefore, demanded of a clerk, who said they were out of town, and left no instructions to pay the note;

2. Ought notice of the maker's default to have been sent to the indorser's country house? The note being dated in New York, the maker and indorser are presumed to have resided and contemplated payment there. It is admitted, indeed, that the indorser did reside in the city at the time of its date, for it is stated that shortly thereafter he went to his country seat, shutting up his house in town. We must take care that, while proper diligence be imposed upon the holder of negotiable paper, we do not exact from him every possible exertion that might have been made to affect an indorser with knowledge of its being dishonored. If he has done all that a diligent and prudent man could naturally and fairly do under like circumstances, if the law has prescribed no certain way of sending a notice in the given case, if the indorser's own conduct has rendered it somewhat difficult to determine in what way the notice ought to be given, and especially if from what has been done it may reasonably be presumed that notice has reached the parties concerned, we should be satisfied, and not ask for more. Indorsers, therefore, cannot complain, if notices of this nature are permitted to be left at their houses in town, notwithstanding their removal into the country during the hot months. It is more reasonable that they leave a person in town to attend to their business, than that the holders of their paper be put to the trouble of finding out to what part of the country they have removed and sending after them. It is also probable, especially when the distance between the two houses is only four miles, as it was here, that some communication will be kept up between them, and that a letter left at the dwelling in town will not be long in finding its way to the country. I speak now of a temporary residence in the country; for a permanent removal from the city might render a different course necessary. Nor was it fatal to direct the notice to the indorser himself; for as it was not known whether he had made a will, nor who his executors were, until long after, it was full as probable that it would reach the parties interested by this address as by any other; some one of the deceased's family would either open it or see it safely delivered to an executor. The notice therefore was well served, and its address proper;

3. What is the effect of the writing given to Waring, one of the makers of this note? The defendants cannot complain of this transaction, nor should they be permitted to derive any benefit from it, unless their remedy against the makers, or either of them, be affected by it. If we understand this paper according to the obvious meaning of the parties and its own import, (and why should it not be so understood?) we may give to it every effect it was intended to produce, without impairing any right of the defendants. The plaintiffs are willing to release Waring, but only on condition of his remaining liable to the representatives of the indorser, and to those to whom they might pass the note. This was necessary to secure their own recourse on the executors of Eden's will. Nor is the exception repugnant to the main object of the release, if it may so be called, for Waring might have set off against Eden's estate, and, therefore, be willing to remain liable to his representatives. This instrument, therefore, is no bar to the present suit;

4. As Metcalf Eden died long before the note became due, it is contended that the evidence not only does not support the promise alleged to have been made by him on the eighth of November, 1798, which was after his death, but shows that it was impossible he could have made it. Averse from nonsuiting the plaintiffs, and thus turning them around to another action, we have been anxious to overcome this objection; but after the best reflection, it appears to us fatal to the present suit. Although, when the holder of a note has done all that is required of him, the law implies an undertaking on the indorser's part, yet where the condition on which this promise arises happens not until after his death, the *assumpsit* devolves on his executors, to avoid the absurdity of a dead man's contracting. The assumption, as here laid, cannot be made good by relation to the date of the note, or indorsement, for it is not merely because of his indorsement that Eden was liable. There must first be a default in the maker, and certain acts done, or diligence used by the holder. It is accordingly stated in this declaration that by reason of a demand of the maker, and non-payment by him, and notice thereof to Eden, he became liable, and being liable, he promised in his life-time to pay, etc.; but it appears in evidence that Eden had been dead two months before he is said to have made the promise. There can be no necessity for declaring in this way, when it would have comported with the truth, and answered as well, to have stated a notice of non-payment to the defendants, and an *assumpsit* by

them. The only case in any degree resembling this is that of *Deane v. Crane*, 6 Mod. 309. An executor had declared on a promise made to his testator above six years before the action was brought, on *non-assumpsit infra sex annos*; it appeared that the defendant had made a promise to the executors after the testator's death, but before any action was brought; all the judges agreed, on the case being referred to them, that the evidence did not support the declaration, but that the executor should have declared on a promise made to himself, so neither here does the declaration support the declaration, which should have been on a promise made by the executors. A nonsuit must, therefore, be entered in conformity with the agreement of the parties. This renders it unnecessary to say what judgment should be rendered against Martha Eden, because, if another action be brought, she can plead separately, and thus avoid her present embarrassment. The other points have been disposed of to prevent their being brought up again in the next action.

Judgment of nonsuit.

This case is extensively noticed by writers on negotiable instruments and its authority well supported. Story on Promissory Notes, refers to it in several places as to the various points decided. Daniel, on Negotiable Instruments, also notices it extensively throughout his work. It is cited by Woodbury, J., in *Harris v. Robinson*, 4 How. 347, on the point of what duty the holder is under to make diligent inquiry. It is also cited in *Wiseman v. Chiappella*, 23 Id. 377, showing that a notice put in the keyhole at the house of an indorser is sufficient; and in *Hawkins v. Thompson*, 2 McLean, 113, on the point of a release to party on a negotiable instrument.

FROST v. RAYMOND.

[2 CASES, 188.]

COVENANT OF TITLE IN CONVEYANCE.—The words “grant, bargain, sell, alien, and confirm,” in a conveyance in fee do not imply a covenant of title; but it is implied by the word “*dedi*” or “gave.”

Action for breach of an implied covenant. The declaration laying the venue in Dutchess county stated that the defendant, in consideration of seven hundred and fifty dollars, did grant, bargain, sell, alien and confirm unto the plaintiffs, in fee, lot number sixty-five or seventy-six, in Junius, Montgomery county, the plaintiffs to elect on or before a certain day which of the lots they would have, with an averment that the defendant was not seised of either of the said lots, nor had any estate in either, so that he could not grant and that he had broken his covenant.

The case now came before the court on a motion in arrest of judgment.

Slosson, for the defendant, contended: 1. That no covenant arises on the words contained in the declaration; "dedi" is the only word that imports a covenant, and that on account of its feudal acceptation. Co. Litt. 384a, (n), 332; Touch. 181; Perk. S. 124. No covenant shall be added to a conveyance which is not expressed or imported by force of the words used: *Bree v. Holbech*, Doug. 654; *Crips v. Read*, 6 T. R. 606; 2. An eviction ought to have been alleged: Touch. 161, (n) 2; 2 Brownl. 161; 3. The conveyance was in the alternative, and an election was therefore a condition precedent and should have been averred: *Goodison v. Nunn*, 4 T. R. 761; *Kingston v. Preston*, Doug. 689; *Duke of St. Albans v. Shore*, 1 H. Bl. 270; 4. The conveyance is void, being of a freehold to commence in futuro: 5. The venue is mislaid; an action arising out of the realty must be where the lands are situated: 1 Com. Dig. 163; Bac. Ab. Visne, pl. 27.

G. B. Van Ness, for the plaintiffs, insisted that the cases cited did not apply to conveyances operating by virtue of the statute of uses; that bargain and sale was a mode of conveyance substituted for the old form of feoffment, and that its operative words should have the same effect as the word "dedi" of the feoffment; that it was not necessary to show an eviction, as no title passed: *Holden v. Taylor*, Hob 12; that no election could have been made as there was no estate from which to choose; that the action arising from a privity of contract and not of estate, the venue was properly laid.

By Court, KENT, C. J. Several objections are taken to the validity of the declaration. We shall, however, confine ourselves to the first and only important one, viz.: that here was no implied covenant of title. It is exceedingly interesting to the community that this question should be clearly settled, and well understood. We are to examine:

1. Whether a sale of an estate in fee, by the formal and apt words of conveyance, and for a valuable consideration, does of itself imply a warranty or covenant of title. The counsel for the plaintiff contended upon the argument that it did;

2. If it does not, then whether there be any particular word or words in the deed, that by settled construction have been deemed to amount to such covenant or warranty.

1. It seems upon the first impression to be highly reasonable and

just that every person, who, for a valuable consideration, conveys land as his own, should be held to warrant the title he so undertakes to convey, or that he should render back the money upon failure of the title. This was the rule of the civil law in respect to the sale of both real and personal property, concerning which that system scarcely made a distinction, an adequate price implying a warranty: Cod. lib. 8, tit. 45, c. 6; Dig. lib. 19, tit. 1, c. 11, s. 2; Lib. 21, tit. 2; 1 Domat. 79, 82, 83; 1 Ersk. Inst. 203. In the early ages of the feudal law, it seems also to have been considered as an obligation upon the lord to give his tenant an equivalent in case of eviction. This appears clearly from the book of feuds, which gives the report of a case of an action by the tenant against the lord, for investing him with a feud belonging to another, and from which he was evicted. The lord was there held to restore him another fee of equal value, or the price of it in money: Feud. lib. 2, tit. 35, 80. But, although the feudal writers speak generally of the lord's obligation to give the tenant an equivalent in case of eviction, Craig, and after him Sir Martin Wright, thinks this obligation never could have applied to pure feuds, which were gratuitous donations for uncertain military services, without price or stipulated render; and that it could only have applied to improper feuds, where it was reasonable it should apply, as in those cases a price was given, or an equivalent contracted for: Inst. to the Law of Tenures, 27, 32, 39, 40. This very question, whether investiture alone, without any express promise, entitled the tenant on eviction to an equivalent, has, it is said, been much discussed by the foreign civilians; that it is the prevailing opinion among them, that the seller, without any promise, is bound to give an equivalent, if the fief was originally granted for services done, or in the way of remuneration: Butler's note 315, to Co. Litt.

But whatever may be our opinions on the point, as an abstract question, or whatever may be the decisions of the civil law, or the feudal and municipal law of other countries, we must decide this question by the common law of England. It was decided in the case of *Seixas v. Wood* (*ante* 215) that, upon a sale of goods without warranty, and without deceit, the purchaser took the soundness and quality of them at his peril. We think it is evident that *caveat emptor* has been always recognized in our law-books as a fixed maxim, applicable equally to the transfer of lands and chattels.

It is a settled question that an estate in fee may be created

by the usual and solemn forms of conveyance, without any warranty express or implied, and that a conveyance in fee does not *ipso facto* imply a warranty. If it does, our books would be inconsistent and unintelligible on this subject. "If a man," says Lord Coke, 1 Inst. 6 a, and also say the judges in *Buckhurst's case*, 1 Co. 1, "maketh a feoffment in fee, without warranty, the purchaser is entitled to all the charters and evidences incident to the lands, to the end that he may defend himself; for, as the feoffer is not bound to warrant the lands, he cannot be vouched to warranty and to render in value, but the feoffee is to defend the lands at his peril." In the case of *Roswell v. Vaughan*, 2 Cro. 196, in the exchequer, Tanfield, the chief baron, said "that if one should sell lands wherein another is in possession, or a horse whereof another is possessed, without covenant or warranty for the enjoyment, it is at the peril of him who buys, and not reason he should have an action by the law, where he did not provide for himself." So in the case of *Medina v. Stoughton*, 1 Salk. 211, Lord Holt observed "that if the seller of goods have not the possession, it behooves the purchaser to take care, *caveat emptor*, to have an express warranty, or a good title; and so it is in the case of land, whether the seller be in or out of possession, for the seller cannot have them without a title, and the buyer is at his peril to see it." In a much more recent case of *Bree v. Holbech*, Doug. 654, the action was brought to recover back money paid for the purchase of a mortgage deed, which afterward turned out to be a forgery. Lord Mansfield and the court of king's bench ruled for the defendant on this ground, that the assignment contained no covenant for the goodness of the title, except only against the acts of the assignor, and that it was incumbent on the purchaser to look to the goodness of it. This case was afterward cited and sanctioned by Lord Kenyon, 6 T. R. 606, who said that he did not wish to disturb the rule of *caveat emptor* adopted in that case, and in other cases where a regular conveyance was made, to which other covenants were not to be added.

The case in Douglas may perhaps be thought to have the less weight, as there was a covenant against the grantor's own acts, and it is a rule that an express covenant will do away the effect of all implied ones: 4 Co. 80, 86; Vaugh. 126; Cro. Eliz. 674-5; Butler's notes on Co. Litt. 332; 2 Bos. & Pull. 26; 2 Ch. Cas. 19. But the court do not intimate that they proceeded upon that ground. This they would have done had they relied upon the extinguishment of the implied covenant by means of the

express one. They adopted the old rule, that if there be no covenant of title in a deed, the purchaser takes, at his own risk, the goodness of the title. After this rule has been so long understood and practiced upon, it would be of the most mischievous consequence to establish a contrary doctrine. The parties to deeds know that a covenant is requisite to hold the seller to warrant the title, and they regulate their contracts accordingly. If there be any fraud in the sale the purchaser has his remedy. If one sell land, affirming he had a good title, when he knew he had no title, an action on the case for a deceit will lie: Com. Dig. tit. Action on the Case for a Deceit, A. 8; 1 Fonb. 366.

2. We are next to examine whether there be any particular words in the granting clause of the deed which imply a covenant.

Glanville, lib. 7, c. 2, says generally that the heirs of donors are held to warrant their gifts, "donations;" and Bracton, lib. 5, fol. 388 b, 389 a, says to the same effect that "warranty belongs to all charters of simple donation, and that the donors and their heirs were held to warranty unless the deed expressed the contrary. But a charter of confirmation did not include a warranty unless it contained a gift, and if the grantor say "*do et confirmo*, or the charter uses the words *dare, vendere*, etc., such a deed contained a warranty. So if homage was imposed, a warranty was implied." It is a little singular that the old writers make the gift (*donatio*) the reason and ground of the warranty. It is the gift by the operative words *do* or *dedi* that creates the warranty. Accordingly, Lord Coke, 2 Inst. 276, says that although *dedi* and *concessi* be coupled together, as in the statute *de bigamis*, yet these words *ratione doni proprii* do appropriate the warranty to *dedi* only. It is our duty to acquiesce in the law as we find it, but we are very naturally tempted to agree with Sir M. Wright, that warranty, instead of being attached to a fee, which was a pure gift, ought more justly to have accompanied a fee, which was created for a valuable consideration.

The statute *de bigamis*, 4 Edw. I, c. 6, is very material to ascertain the ancient law on the subject, since it was only declaratory of the common law: 2 Inst. 274. It says "that in deeds wherein is contained *dedi* and *concessi* without homage or without a clause of warranty, and to be holden of the givers and their heirs, by certain services, it is agreed that the givers and their heirs shall be bound to warranty. And where is con-

tained *dedi* and *concessi*, etc., to be holden of the chief lord of the fee, and not of the feoffors or their heirs, reserving no services without homage, or without the aforesaid clause, their heirs shall not be bound to warranty, notwithstanding the feoffor during his own life by force of his own gift shall be bound to warrant." By the statute, then, *dedi* is declared to amount to a warranty for the life of the feoffor, 4 Co. 81 a, and this is the word that Coke considers, 2 Inst. 275 b, as the real operative word to create a warranty in law, and it hath this effect, whether the conveyance in which it is found operate as a feoffment, release or confirmation.

The statute of *quia emptores*, 18 Edw. I, which followed soon after, prohibited all subinfudations, and put an end to homage, which was, in those days, parcel of the tenure reserved to the feoffor, by declaring that it should be lawful for every freeman to sell his own lands, and that the feoffee should hold the lands of the chief lord of the fee by the same services that the feoffor was bound to before. This statute accordingly changed, in a great degree, the operation of the word *dedi*, by confining the implied covenant it contained to the life of the feoffor, according to the directions of the statute *de bigamis*, except in cases of gifts in tail and leases for life: 2 Inst. 275. Since that time it has been well understood and declared through all the books that the word *dedi* in a deed in fee, amounted to a warranty in law to the feoffee and his heirs only during the life of the feoffor: Co. Litt. 334 a; Touch. 180, 182; F. N. B. 134 H.; 2 Bl. Com. 300.

This word *do* or *dedi*, which is the apt word of feoffment, as that conveyance was anciently called a *donatio*, is not, however, the word used in the deed before us. The only word in the present case that can be considered as implying a covenant, is grant (*concedo*): Co. Litt. 9 a, b, and that word is carefully to be distinguished from the other; for it is well settled that *concessi*, in a feoffment or estate of inheritance, implieth no warranty. It only creates a covenant in a lease for years: Co. Litt. 384 a; Bac. Ab. tit. Covenant B; 5 Co. 17 a; 2 Roll. Rep. 399; Palm. 388; Carth. 98; *Pincombe v. Rudge*, Hob. 3; Yelv. 139; Cro. Eliz. 674; Sir Geoffry Palmer's opinion, Butler's note, 332, and 2 Col. Jur. 437; 3 Kib. 188, 617, *Brown v. Haywood*, Noy, 131; Saunders on Uses, 406, 407, note.

We are not able to assign a very solid reason for this distinction between the force and effect of the words "give" and "grant." It arose from artificial reasons derived from the

feudal law. The distinction is now become merely technical, but it is sufficient that it clearly exists, and we are certainly not at liberty to confound the words or change their established operation.

The other words in the deed "bargain, sell, alien and confirm," have never been considered as implying any covenant whatever in any case. The only *dictum* that appears to oppose the law as now laid down, is that of Lord Eldon, in the case of *Browning v. Wright*, 2 B. & P. 21. He there says that the words grant, bargain, sell, enfeoff and confirm, import a covenant in law. We admit and have shown that the word grant imports such a covenant in an estate for years, and so also does the word enfeoff. But in the case referred to they were used in a deed in fee, and if he means (as it would seem that he did) that they there also imported a covenant, we cannot agree to that opinion, however respectable it may be, as it is opposed to the whole stream of the book authorities. We accordingly conclude that in the present case the motion in arrest of judgment ought to be granted.

LIVINGSTON, J., delivered a concurring opinion.

Judgment arrested.

Regarding covenants in conveyances, it is thus stated in 4 Kent's Com. 473, 474: "There are implied as well as express covenants concerning land, and the former run with the land. The grant of a watercourse implies a covenant by the grantor not to disturb the grantee in the enjoyment of it. Any disturbance in the enjoyment of property contrary to the grant of the party creating the disturbance is a breach of covenant. In Pennsylvania, Delaware, Illinois, Indiana, Missouri, Mississippi, and Alabama, it is declared by statute, that the words grant, bargain, and sell, in conveyances in fee, shall, unless specially restrained, amount to a covenant that the grantor was seised of an estate in fee, free from incumbrances done or suffered by him, and for quiet enjoyment as against his acts. But in *Gratz v. Ewalt*, 2 Binn. 95, that those words in the Pennsylvania statute of 1715, (and the decision will equally apply to the same statutory language in the other states) did not amount to a general warranty, but merely to a covenant that the grantor had not done any act, nor created any incumbrance, whereby the estate might be defeated. Upon this construction the words of the statute are divested of all dangerous tendency; and they amount to no more than did the provisions in the English statute of 6 Anne, c. 35, sec. 30, upon the same words. It may not be very inconvenient that those granting words should imply a covenant against the secret acts of the grantor; but beyond that point there is great danger of imposition upon the ignorant and the unwary, if any covenant be implied, that it is not stipulated in clear and precise terms. In New York it was decided in *Frost v. Raymond*, and proved by an examination of the authorities, that the words 'grant, bargain, sell, alien, and confirm,' did not imply a covenant of title in a convey-

ance in fee, though the word 'grant,' or the word 'demise' would imply a covenant of title in a lease for years. The word 'give,' it was also shown, would amount to an implied warranty during the life of the feoffor. But this doctrine, though deemed sound and applicable in those states which continue to be governed on this point by the common law, has ceased to have any operation in New York, under the provision in the revised statutes. In North Carolina and Alabama the words 'give, grant, bargain, sell,' etc., do not imply any warranty of title, and this is the conclusion which sound policy would dictate. To imply covenants of warranty from the granting words in a deed, is making those words operate very often as a trap to the unwary."

CLINTON v. CROSWELL.

[2 CALVES, 244.]

CHANGE OF VENUE IN LIBEL.—In an action for a libel, the court will not, upon the common affidavit, change the venue from the county in which the libel was circulated to that in which it was printed and first published.

Action for publishing a libel.

Hopkins, upon the common affidavit, moved to change the venue from the city and county of New York to the county of Greene.

Riker, in opposition to the motion, read an affidavit of the plaintiff, stating that he resides in New York; that the suit was brought for the publication of a libel in a newspaper, published in Greene county, by the defendant, which was seen by many persons in this city; and that the plaintiff verily believed the defendant was the editor or printer of said paper. Upon these facts, counsel insisted, that the cause of action did not arise wholly in the county of Greene, as stated in the affidavit in support of the motion, but that a right of action accrued wherever the paper circulated; that it was of more importance to an individual to protect his character against libels disseminated in the place of his residence, than in a remote section where he might be scarcely known: *Pinkney v. Collins*, 1 T. R. 571.

By COURT. There is no ground for the application. The defendant can take nothing by his motion, and must pay costs to the plaintiff.

Motion denied.

WALDEN v. LE ROY.

[2 CARRER, 263.]

WAGES AND PROVISIONS SUBJECTS OF GENERAL AVERAGE.—Where a vessel in consequence of damages was obliged to seek a port of safety in order to refit, the wages and provisions from the moment of bearing away to the period of setting out again on her original voyage constitute a subject of general average, the proportion of which may be recovered in an action of *assumpsit*, by the owners of the ship against the proprietors of the cargo; and consequently it is a charge for which the insurers on the cargo are liable.

ASSUMPSIT. The plaintiffs, the owners of the ship Thomas, declared against the defendants, the proprietors of the cargo, for their proportion of a general average for wages and provisions incurred and expended from the time of bearing away to Norfolk in consequence of a leak sprung in a violent gale of wind, which, on consultation with the crew, rendered it necessary to make for the nearest port in order to refit. The demand extended from the moment of bearing away to the period of sailing on the original voyage, including the time of detention in unloading, repairing and reloading. The question in the case was, whether under such circumstances wages and provisions were subjects of general average.

By Court, KENT, C. J. In the case of *Leavenworth v. Delafield and Dale* (*ante* 201,) decided in this court in February, 1804, the vessel was captured and carried into port, where she was detained four months and then liberated. It was there held that the wages and provisions of the crew during the detention were to be brought into a general average. In this case the vessel was forced into port by injuries received at sea, which rendered it necessary for the general safety to go into the nearest port to repair. The two cases appear at first view to be sufficiently analogous to admit the application of the same rule, but there is no direct determination on the point in the English law. As far, however, as the question has been incidentally noticed, the opinion seems to have been in favor of the plaintiff's claim, in this case, to general average for the wages and provisions of the crew during the detention at Norfolk. There were some *nisi prius* decisions before Lord Mansfield, which may be considered as having a remote bearing on this question. In the case of *Fletcher et al. v. Poole*, tried at the sittings in 1769, the vessel was forced into Minorca to repair, and in an action against the insurer on the ship for wages and provisions expended while she was detained to refit, his lordship held that they were never

to be allowed against the insurer as a charge against the ship: Park. 53. But afterward, in the case of *Lateward v. Curling*, in which the same question arose, Lord Mansfield admitted there were exceptions to the rule, as when it appeared that the expense was absolutely necessary and occasioned by some of the perils mentioned in the policy: Park. 125; Marshall, 464. This last case has been considered by the two authors last cited, and also by Buller, J., in *Da Costa v. Newnham*, as containing an approbation by Lord Mansfield, of the rule that if a vessel went into port to repair from necessity, those expenses would become general average. I do not think, however, that much, if any, reliance ought to be placed on *nisi prius* opinions so destitute of explicitness on this point, and in which the question as to general average does not appear to have been mentioned; and the same remark will apply to what fell from Buller, J., in *Robertson v. Ever*, 1 T. R. 132. The case of *Da Costa v. Newnham*, 2 Id. 407, is, however, material and important on this subject. In that the decision of the court of king's bench approaches very near to a sanction of the above expenses as a general average. It was held, where a ship is obliged to go into port for the benefit of the whole concern, the charges of loading and unloading the cargo and taking care of it, and the wages and provisions of the workmen hired for the repairs, become general average. It was not requisite in that case to decide whether the seamen's wages and provisions should become general average, as the crew had been discharged; but the two cases are very analogous in principle, and have been so regarded by Park and Marshall. I cannot perceive any sound distinction between them. But Abbott, p. 282, 283, states the question now under consideration as one upon which a reasonable doubt may be entertained, and on which our law books furnish no decision. He seems rather to intimate his own opinion to be against the allowance of the wages and provisions of the crew, although he admits, on p. 280, the expense of unloading and shipping should be sustained by general contribution. He submits the following distinction for consideration; that if the damage to be repaired be in itself an object of contribution, the incidental expenses ought to be so, otherwise not. The opinion of this author is very respectable, as he is one of the most learned and accurate of the English writers on commercial law. But it is to be observed he states the question as doubtful and gives no decided opinion, and his distinction is liable to this objection, that it is repugnant to the rule he had already

laid down, that if it be necessary to unload the goods in order to repair the vessel, the expense of that unloading, warehousing, etc., go into a general average. Those expenses are certainly as collateral or incidental to the repairs as the provisions of the crew during that detention, and the wages of the workmen employed are still more closely incidental to the repairs, and yet we see that they are allowed while the repairs are not.

The question, upon the whole, may be considered as still open in the English law, but with a pretty evident inclination in the courts, and in most of the writers, to apply the rule of contribution to the present case. The law merchant is, however, the general law of commercial nations; and, where our own positive institutions and decisions are silent, it is to be expounded by having recourse to the usages of other nations. This has been the maxim from the time of the Rhodian law to this day.

Ricard, the Amsterdam merchant, says, that if a ship is forced by tempests to go into port to repair, and cannot continue the voyage without hazard to all concerned, the wages and provisions of the crew from the day it was determined to seek the port, to the day of the vessel's departure again on the voyage, are to be brought into gross average. Beawes has adopted this passage from Ricard; for he lays down the rule in the same words, vol. 1, 161, and it is to be observed that Beawes is frequently regarded and cited in our books as an authority in the English law. Emerigon also, vol. 1, 625, says, that there is the same rule in the maritime jurisprudence of France; and it appears from the case of *Newman v. Cazalet*, cited in Park, 424, to be the established rule in the commercial court at Pisa. As far, then, as the foreign writers and decisions are to influence, the rule may be considered as established in favor of the plaintiffs' claim. The case reported in the text of the civil law, Dig. 14, 2, 6, and upon which some of the foreign civilians have established their doctrine, was merely whether the expenses of the repairs themselves should be made a general average, *navis pro damno confere debeant*, and it was decided they ought not. The present decision will not, therefore, interfere with this case in the civil law. Independent of these foreign authorities I cannot distinguish this case in principle from that of *Leavenworth v. Delafield and Dale*. It is equally necessary, in both cases, that the mariners should remain for the purpose of proceeding to the port of discharge, as soon as the inevitable misfortune, the *casus fortuitus*, creating the delay is removed.

The cargo might be sacrificed at the intermediate port, if the crew were not to be detained, and the expenses of their detention, being for the common benefit, ought to be apportioned as a common burden. On the analogy, then, between this case and those decided in this court and England, on the ground of the foreign decisions, in a case appertaining to the commercial law of nations, and on the reason of the case, as coming within the spirit of the rule for contributions, we are of opinion for the plaintiffs.

LIVINGSTON, J., delivered a dissenting opinion.

Judgment for the plaintiffs.

This case was cited as authority by Clifford, J., in *The Star of Hope*, 9 Wall. 236, where it is said: "Whatever the nature of the injury to the ship may be, and whether it arose from the act of the master in voluntarily sacrificing a part of it, or in voluntarily stranding the vessel, the wages and provisions of the master, officers and crew from the time of putting away for the port of succor, and every expense necessarily incurred during the detention for the benefit of all concerned, are general average."

PEOPLE v. BARRETT.

[2 CARRER, 304.]

DISCHARGE OF JURY WITHOUT PRISONER'S CONSENT.—After a prisoner has pleaded to an indictment, and the jury have been sworn, and evidence offered, if the prosecution, without the prisoner's consent, withdraw a juror, merely because they are unprepared with evidence, the prisoner cannot afterward be tried on the same indictment, and if tried, it is a good cause for arrest of judgment.

INDICTMENT for conspiracy. After the jury had been sworn, and the defendants had been arraigned and pleaded not guilty, the district attorney served on Barrett a notice to produce a promissory note mentioned in the indictment, or that parol testimony would be given of its contents, and asked his counsel if they were ready to proceed, to which they replied they were. The note was then called for, and not being produced, the district attorney offered parol testimony, which was objected to from the want of due notice, as the note was at a house distant fourteen or fifteen miles. The testimony was overruled; whereupon the district attorney moved for leave to withdraw a juror, which was granted without the defendants' consent. Subsequently, the defendants were again arraigned, and tried and found guilty on the same indictment. The question was, were these facts sufficient to arrest the judgment?

Crary and Henry, for the defendants, contended that a jury sworn and charged in a criminal case cannot be discharged, without the consent of the prisoner, till they have given a verdict: 4 Hawk. 459 b, 2, c. 47, s. 1; 1 Inst. 227; 3 Id. 110; Foster, 16, 30, 38; *The King v. Perkins*, Carth. 465; *Rex v. Jeffs*, 2 Str. 984. That the only exceptions to the rule are: Where the prisoner himself, by improper practice, has endeavored to elude justice; where the indictment is not appropriate to the offense; unavoidable accident, as insanity of a witness: 1 Hale, 35; or where a woman is seized with the pains of labor when under trial: *Elizabeth Meadow's case*, Foster, 76; inability of the jury to agree after long confinement: *People v. Olcott*, (1 Am. Dec. 168;) 2 Hale, 295; and where the trial is so prolonged that the court and jury are tired out, and need refreshment; that the present case came within none of the exceptions.

Russel, district attorney, for the plaintiff, urged that the informality of the notice was waived by the declaration of defendants' counsel that they were ready, and contended further that the court possessed discretionary powers in withdrawing a juror, even against the consent of a prisoner, where there was fear of a failure of justice: 2 Hale, 295; that such was the practice in cases of bad indictment: *Rex v. Segar*, Comb. 401; Sir T. Raym. 84; that in *Roberts's case*, Kelyng, 26, the court discharged the jury because the evidence was insufficient; so also where testimony was wanting: *Gardiner's case*, Kelyng, 47; *Jones and Bevor's case*, Id. 52; Foster, 328; and that the passages cited by the opposing counsel, from Lord Coke, are denied to be correct in *Kinloch's case*, Foster, 16.

By Court, LIVINGSTON, J. Without denying the right of courts to withdraw a juror in criminal causes, and put the defendant on his trial a second time, it is evident this power should not be lightly used, but confined as much as may be to cases of very urgent necessity, where, by the act of God, or by some sudden and unforeseen accident, it is impossible to proceed without manifest injustice to the public, or the defendant himself. We do not mean at present to define all or any of the cases in which this practice may be pursued, but we all agree that a defendant ought in no case to be put on a second trial for the same offense where a juror has been discharged on no other ground than because the public prosecutor found himself unable to proceed for the want of sufficient testimony to convict, and where this inability was the consequence of his not taking the neces-

sary measures to obtain it. To discharge a juror under such circumstances would be liable to great abuse and oppression. If the prosecutor disliked the jury, or some of them, or hoped to find the defendant less prepared at a future day, or wished unnecessarily to harass him, he might, at any time, attain his end, if, by solely alleging the want of proof, after a jury were sworn, he could get rid of them. It will be much better that the guilty now and then escape in this way, than to introduce or sanction a practice which may place the innocent entirely in the power of a court, or a public prosecutor, which this mode of trial was intended to guard against. It will be recollected there was no improper practice here on the part of the defendants, or any tampering with witnesses to keep them out of the way. In saying they were ready for trial, the defendants told no more than the truth; but such declaration could not have obliged them to produce a paper against themselves, and which it does not appear they had with them. We are, therefore, of opinion that the court below ought not to proceed to judgment on this conviction, but discharge the defendants.

Judgment arrested.

DAVY v. HALLETT.

[8 CASES, 16.]

POLICY ON FREIGHT, INTERPRETATION OF.—A valued policy on freight was stated to be “at and from” one port to another, and “at and from thence” back to the original port, and a premium was demanded double that which was demanded for the outward voyage; it was held that freight to the full amount of the valuation was covered on each voyage, and the insured on a capture on the return voyage entitled to recover the full amount of his policy, without making any deduction for the freight received on the outward risk.

VALUED POLICY, WHEN ATTACHES.—On a valued policy on freight, if there be an inchoate right to some, and the transaction *bona fide*, the value cannot be inquired into.

RIGHTS OF AN INSURED ON VESSEL AND FREIGHT.—If a ship-owner have his vessel and freight insured with two different underwriters, and on a capture abandon first to those on the vessel, and then to those on the freight, taking afterward fifty per cent. of his claim on the underwriters on the vessel, and in payment of the other fifty an assignment of their rights in the vessel, he will be entitled to receive the freight which they would have been entitled to, and to recover from the insurers of the freight the full amount of his policy, deducting the pro rata freight earned previous to the abandonment on the voyage on which captured.

ASSUMPSIT upon the policy on the freight of the sloop Hannah, valued at two thousand dollars, "at and from Philadelphia to Omoa and Golfo Dulce, and at and from thence to Philadelphia," at a premium of twenty-two and a half per cent. The facts, as appeared from a case made, were:

In August, 1800, the vessel sailed on the voyage insured, and arrived in safety at Golfo Dulce, having earned freight to the amount of two thousand dollars. She then took in a return cargo for Philadelphia, the freight on which was two thousand dollars more, and sailed on her homeward voyage, but was, on the very next day, captured by a British man of war, who carried her into Belize, in the bay of Honduras. She remained there some time, when her crew were taken out of her, and she was sent, under charge of a prize-master, to Jamaica for trial. Whilst in possession of the captors, an abandonment was duly made of the vessel, cargo and freight to the respective underwriters. Those on the vessel and cargo accepted the abandonment of the interests they had severally insured; but the defendant, who had subscribed the policy on the freight, refused. The sloop and cargo were afterward proceeded against in the admiralty, and by a decree acquitted; but the claimants were condemned in costs to the captors. An appeal being taken, the sloop and her cargo were, as was usual, ordered to be appraised and restored to the claimants, on their giving security to account for the value in case the sentence should be reversed. The vessel and cargo were therefore appraised, and security given by two sureties, who took possession of both and sent them to their correspondents, Messrs. Elliston & Perot, of Philadelphia, in whose possession they were at the commencement of the present action. The plaintiff, however, on the arrival of the vessel at quarantine, agreed with the underwriters upon her to be substituted in their place, and to defend the appeal at his own risk and expense, on their paying him fifty per cent. In consequence, the money was paid by the insurers on the sloop, who executed a power of authority to Davy, constituting him their agent to defend the appeal in their names. By virtue of this authority, the plaintiff had, on discharging the advances and expenses on account of the vessel, got possession of her at the time of trial, and had received two thousand dollars, the amount of her return freight. It was admitted that the premium on the outward voyage only, would have been one-half of that paid, and that the decree of the admiralty court had been recently confirmed, but without costs. A verdict being taken

for two thousand two hundred and forty-five dollars, it was agreed that if the court shall be of opinion that the plaintiff was entitled as for a total loss, the proportion of freight earned, which the defendant might be entitled to, if any, should be deducted, and the account adjusted. In case it should be thought the plaintiff should be entitled to only a partial loss, the same to be in like manner adjusted, on such principles as the court might direct, with liberty to either party to turn the facts of the case into a special verdict.

Hoffman and Harison, for the plaintiff. It was contended, they said, on the defendant's part, that the valuation was to be thus interpreted: One thousand dollars out, and one thousand home; making in the whole, the sum of two thousand dollars, one thousand of which was earned on the arrival at Golfo Dulce. The plaintiff, on the other hand, insisted that the homeward and outward freight are valued by the instrument at two thousand dollars each. The amount of premium paid is for two thousand dollars round. The only case analogous to this, is an insurance on goods out and home, where the valuation extends to both voyages.

The second point will depend on the right to abandon. The insured, at the time of making the agreement with the underwriters on the ship, had divested himself of all his interest in the several subjects he had insured; and by reason of the agreement the plaintiff became a *bona fide* purchaser of the underwriters' rights on his vessel. In this capacity, and through them, he received the freight due to the then owners. He now applies to the defendant in his own right, for a loss on the policy, as to himself. The case states that the proportion of freight to which the defendant may be entitled, shall be deducted from the amount of the verdict; but it is not meant that there shall be a set-off, for that cannot exist after the suit is begun. It is introduced for the sake of giving the court an opportunity of deciding what pro rata freight the defendant may be entitled to, and up to what time.

Boyd and Pendleton, for the defendant, stated that the policy being for one entire risk out and home, there could be no apportionment. As the contract was entire when the abandonment was made, it necessarily transferred the outward freight which had been earned. The assured, by his agreement with the underwriters on the ship, placed himself in his original station, and having received the full freight, stands, as respects the de-

fendant, exactly as if the capture had never taken place. In *Thompson v. Rowcroft*, 4 East, 34, under a similar abandonment of all the interests insured after a capture, it was held that the insurer on freight might, after payment of a total loss to the insured, recover from him the amount of freight which he had received. It is true, in this case there was an express agreement to pay it over. But whatever is received during the voyage insured, is, after abandonment, to be carried to the credit of the underwriter: 2 Emerig. 222.

KENT, C. J., delivered the opinion of the court. This is the case of a valued policy upon freight, and the valuation becomes a very material fact in the consideration of the cause. The plaintiff was owner of vessel, cargo and freight, and had them all fully insured; and the vessel being captured after the return voyage had commenced, he duly abandoned all the subjects to their respective insurers. The insurance was for two thousand dollars in value, of freight; and if, at the time of the total loss, there was an inchoate right to a freight to the amount of the insurance, the plaintiff must be entitled to recover. This principle was fully established in the cases of *Montgomery v. Eggington*, 3 T. R. 362, and *Thompson v. Taylor*, 6 Id. 478. In the present instance there was, when the vessel was captured, an inchoate freight attached equal to two thousand dollars. There was some freight already earned when the capture took place, but the amount of it becomes immaterial, as the valuation in the policy precludes inquiry into the value; and this valuation is to be adhered to, if the case be fair and honest between the parties, notwithstanding events in the course of the voyage may render the loss even advantageous to the insured: *Shawe v. Felton*, 2 East, 109. It is sufficient if there be freight at risk, equal to the sum insured, when the loss happens, and that some freight has been already earned for the insured. If we were to sustain an inquiry into the value of the freight, it would be doing away with the effect of the valued policy.

Several objections have been stated against the plaintiff's right of recovery in this case, but it appears to me that they are capable of a sufficient answer. The abandonment of the vessel took away from the insurer on the freight the *spes recuperandi*, or the chance of an ultimate recovery of the subject; because as between the insurers on the ship and freight the claim of the insurer on the ship to the freight must be admitted to preponderate; and this seems to have been the opinion of Lord Ellenborough in the recent case of *Thompson v. Rowcroft*, 4 East, 34.

The abandonment of the ship did not affect the plaintiff's right to a proportion of the freight on the return voyage. This was so considered in the case of *Lenox v. United Insurance Company*, which was finally determined in the court for the correction of errors in 1801; and although the court was divided in that case, and the majority of the bench did not concur in any opinion on the merits of the cause, we are not now disposed to question the correctness, and much less the authority of that decision. It was determined in that case that upon abandonment of the vessel, the owner of the freight being also owner of the ship, did not thereby abandon his freight *in toto*, but that he retained a certain part to be apportioned *pro rata itineris*, and, consequently, to be carried down to the time when the loss happened. The insured, therefore, upon the vessel, as between him and his insurer, still retained his right to a ratable freight, and if he has had the precaution to have his freight insured, we do not see why he may not resort for indemnity to the insurer upon the freight. As long as vessel and freight are regarded in our law as distinct subjects of insurance, the inconvenience that we have suggested, which falls upon the insurer on freight, seems to be inevitable. There is in this case conflicting rights, and some one must yield. The owner of ship and freight is authorized to insure each of them distinctly, and the law must have intended that each of the policies should have a full and effectual operation, according to the established principles of insurance. It would be to maintain a paradox to contend that, by an abandonment of the ship in such a case, the remedy upon the policy upon the freight was forever gone. One contract cannot be destroyed by the operation of another contract *inter alios*. The insurer upon freight must therefore submit to a total loss in every such case, with the exception of the ratable freight which does not go with the abandonment. The abandonment of the ship is an act in which he has no direct concern, and his contract with the assured contains no control of that act. The loss of any chance of recovery of freight is a consequence incidental merely to the abandonment of the ship, and arises from meeting with the paramount claims of the insurer on the ship, and he must be left to provide against it by some special contract with the insured, as was done in the case of *Thompson v. Rowcroft*.

Another objection to the recovery in this case is, that freight to the amount of two thousand dollars had already, during the course of the same voyage, been earned and received by the

plaintiff. But the present insurance was not upon the totality of freight for the whole voyage, but upon so much freight in that voyage as would amount to two thousand dollars. The observation, therefore, of 2 Emerig. 222, does not apply, when he says that the freight received by the insured in the course of the circuitous voyage is received on account of the insurer, if by perils an abandonment becomes necessary. The author is there speaking of insurances upon the whole subject for an entire voyage. The present case is analogous to that cited in 2 Valin, 87, and 2 Emerig. 39, 40, in which one caused an insurance to be made to the amount of one thousand livres upon goods on board a vessel from America to Marseilles. The vessel sailed with a cargo to the amount of three thousand livres, and discharged two-thirds thereof at Cadiz, leaving goods on board for the remainder of the voyage to the amount of the insurance. It is the opinion of these authors, and the same is confirmed by Pothier, that the policy was not thereby reduced two-thirds in value, but operated still upon all the cargo on board to the amount of the one thousand livres. To apportion the loss and gain in this case, so as to make the gain of one moiety of the outward freight inure to the insurer, and the loss of one moiety of the homeward freight to fall upon the insured, would be an arbitrary rule, and would not give the plaintiff his just indemnity. It would be changing the legal operation of this contract, and making it an insurance of one moiety only of the outward, and one moiety of the homeward freight, instead of an insurance to the amount of the valuation on so much freight pending, when the loss arose. The payment of the double premium is a pretty sure index to the intent of the parties, that the policy should attach on the outward or homeward freight, according to events. The policy was to be valid and operative as long as there was aliment to keep it alive.

With respect to the subsequent contract between the plaintiff and the insurer on the vessel, it appears to us not to have any influence on the present demand. It was not a waiver of the abandonment, but a fair repurchase of the right of redemption of the vessel, for a valuable consideration, and we think the present question ought to be decided in the same manner as if no such contract and substitution had taken place. The abandonment had been accepted, and the right of property in the vessel absolutely vested in the insurer.

Our opinion accordingly is, that the plaintiff is entitled to recover as for a total loss, subject, nevertheless, to a deduction

of the small ratable freight which did not pass with the abandonment of the ship, to be adjusted according to the principles established in the case of *Lenox v. The United Insurance Company*, and such is the decision of the court.

LIVINGSTON, J., having been concerned, gave no opinion.

Judgment for the plaintiff for a total loss.

The principal point raised in this case is thus stated in 2 Phillips on Insurance, sec. 1208: "Suppose the voyage to have intermediate stages at which freight up to the time is earned, and becomes due, independently of the circumstance of the vessel's arriving at subsequent stages; and the freight of the whole voyage is valued in gross. Is this a valuation of the amount of all the freights, or of the amount of each severally?" He cites this case as supporting the latter view. Parsons, citing this case, thus presents the question: "If the freight be valued at a certain sum at and from the home port to a foreign port, and at and from that port to the home port, and the vessel arrives safely out, and there earns and receives a freight equal to the whole valuation, and is lost on her return to the home port, the freight on which return voyage would have been the same that it was on the voyage out, it is obvious that there are two ways in which the loss might be adjusted. One would be to consider the valuation as applicable to the whole voyage; then half the valuation would have been earned, and the insurers would be liable only for the other half. The other way would be to consider that the valuation applied first to the voyage out, and then to the voyage home; and then as the whole freight home was lost, the insurers would have been liable for the whole amount. In a case presenting precisely this question, the court adopted the latter view:" 1 Marine Ins. 276.

STEVENS v. THE COLUMBIAN INS. CO.

[3 CARRER, 43.]

POLICY ON FREIGHT—AMOUNT RECOVERED.—Under an open policy on freight, the gross amount is on a total loss, the amount to be recovered, without being subject to a deduction for expenses of wages and provisions.

ACTION on an open policy of insurance for the recovery of sixteen thousand dollars on the freight, by charter party, of the ship *Swan*, from Havana to New York. A total loss and the plaintiff's right to a verdict were admitted; but the defendants contended that as the plaintiff would, had the vessel arrived safe, have necessarily been put to the expense of wages and provisions, though the whole freight would have been due, so in the case of a total loss, the amount of these wages and provisions was what the insurers were entitled to deduct.

The jury, by consent, found for the full sum mentioned in

the policy; and the question now raised for the determination of the court is, whether the plaintiff ought to recover the gross amount as subscribed for in the policy, a specific proportion only, or the actual net freight after making the deduction insisted on.

D. B. and T. L. Ogden, for the plaintiff, insisted that freight was the compensation paid to the owner of the vessel at the termination of the voyage for the use of the ship, that in this case it was the amount specified in the charter party, and that sum was the subject of the insurance in the policy on which the action is brought; that it was a general principle, wherever the right to freight has commenced, the whole is due: *Shawe v. Felton*, 2 East, 109; *Thompson v. Taylor*, 6 T. R. 478, held that, as the right to freight, though inchoate, had commenced, the underwriter was bound to pay all that the insured would have received had the accident not occurred.

Pendleton, for the defendant, contended that the contract of insurance being one of indemnity, the compensation must be no more than the injury actually sustained: 2 Marsh. 529; 2 Emerig. 221; that had the voyage been concluded, the freight would have been nothing more than the surplus after paying wages and provisions; and that the insurer ought to pay no more than the insured would have received; that in an open policy, freight means "the actual net freight." Millar, 247; and *Leavenworth v. Delafield* (*ante*, 201) adopts the same principle; that in the case of *Thompson v. Taylor*, the policy was valued; therefore the arguments deduced from it do not apply.

By Court, THOMPSON, J. We think the assured is entitled to recover the gross amount of freight. Although indemnity is the leading object of insurance, it is not always the criterion by which to ascertain the amount of the loss. In an open policy on goods, the rule by which to estimate a total loss is the invoice price and all duties and expenses till they are put on board, together with the premium of insurance. After a long voyage, and when the goods had almost reached a profitable market, it might with plausibility be urged that the above rule would not afford an indemnity; but to depart from it, however reasonable and just it might appear in some cases, would lead to endless uncertainty and litigation. So likewise in an open policy on a vessel, her value at the time she sails with the expense of her outfit and premium is the rule by which to estimate a total loss. It has frequently with great propriety been said that in matters

of commerce the plainest and simplest rules are always best. They are easily learned and easily obtained, and do not depend on any subtleties and niceties. No general rule giving a specific proportion of the freight could with justice be adopted. It would operate unequally by reason of the great diversity in the distance and expense of voyages; and to adopt the net amount of freight as the rule, would lead to much litigation and uncertainty respecting the deductions to be made. But to take the gross amount of freight as the rule of damages would be equal, simple, and easily ascertained. Mr. Justice Lawrence, in the case of *Shawe v. Felton*, says: The period to look to in order to ascertain the value of the subject-matter of insurance is when the vessel sails, and not the state of the thing at the time the total loss happens. The case of *Thompson v. Taylor* may be considered in some manner as illustrative of the practice in England on this subject. Some doubts have been raised whether that was an open or a valued policy. We think, however, that it is pretty evident it was an open policy. Park, page 36a (he was counsel in the cause), in his report of the case expressly so states it, and although it might be inferred from the statement of the case by Durnford and East that it was a valued policy, yet it is alleged in the arguments of counsel to have been an open policy, and that circumstance is made the basis of some of their reasoning. The question there was whether the assured's right to freight had commenced, the vessel being under a charter party to sail from London to Teneriffe and there take in her cargo, as she had been captured before her arrival at Teneriffe before taking any of her cargo on board. The court determined that there was an inchoate right to freight the instant the vessel sailed from London, and the assured recovered the gross amount of the freight stipulated in the charter party. In that case we hear nothing respecting deductions, although the vessel had performed only a very small part of her voyage. Had the practice in England warranted such a claim it would doubtless have been made. Upon the whole, we think to take the gross amount of freight as the measure of damages is the least exceptionable rule, and most in unison with the acknowledged principles adopted in analogous cases, and not altogether without authority to support it. The opinion of the court, therefore, is that the plaintiff have judgment upon the verdict of the jury according to the stipulation in the case.

Judgment for plaintiff.

SMEDES v. HOOGHTALING.

[3 CASES, 48.]

RECOVERY BEYOND PENALTY IN BOND.—Where the condition of a bond for the payment of money is broken, interest may be recovered, though it exceeds the penalty in the bond; and a recovery in such cases depends upon principles of law, and is not subject to the arbitrary discretion of a jury.

ACTION brought in October, 1802, on a bond, dated fourth June, 1776, conditioned for the payment of two hundred pounds, with interest at four per cent., on the fourth of June, 1777.

The defendant pleaded payment, and relied on the presumption of law arising from lapse of time.

On the trial no evidence was adduced of the payment of any interest on the bond; and from the testimony of a mesne assignee who had been released by the plaintiff, it appeared that, upon the division of the obligee's estate, the bond had been taken, as a part of her share, by the mother of the obligor, and at his request, because "he then should never have to pay it;" and that the mother had declared she "had nothing against the obligor," but did not give him a discharge through fear of her daughters. It was, however, shown that in the same year in which the mother made the above declaration, a demand of payment was made upon the obligor, who then acknowledged the bond to be due, and apologized for having suffered it to remain so long.

Upon this testimony, the jury found for the plaintiff. But a question then arose whether the interest could be calculated beyond the penalty, and a verdict was taken for the full amount, with an agreement to reduce it in case the court should be of opinion that it could not; but no new trial to be granted on that account.

KENT, C. J. This case is submitted without argument. On a review of all the decisions on this subject, the court think this rule ought to be adopted, that interest is recoverable beyond the penalty of the bond. But that the recovery depends on principles of law, and is not an arbitrary *ad libitum* discretion of a jury. In the present instance, we are of opinion that it is due, and therefore the verdict to remain unaltered.

Judgment for the plaintiff.

This case will be instructive when taken in connection with *Graham v. Bickham*, 1 Am. Dec. 328, and the note thereto.

PELTON v. WARD.

[3 CAINES, 73.]

WORDS ACTIONABLE IN SLANDER.—Saying to another: "You swore to a lie, for which you now stand indicted," is actionable.

PLEADING IN ACTION OF SLANDER.—If, in an action for slander, a count be insufficient, and the declaration do not contain any introductory matter or *colloquium* by reference to which the charge can be made certain, the defect in the count cannot be overcome by a justification and confession of the words in bar.

ACTION for slanderous words spoken of the plaintiff, which came before the court on a motion in arrest of judgment.

The declaration consisted of nine counts. The first, second and third charged the defendant with saying: "You swore false." The fourth, fifth and sixth with saying: "You swore to a damned lie, and you knew it." The seventh, eighth and ninth with saying: "You swore to a damned lie, and you knew it, for which you now stand indicted," with an innuendo that the plaintiff had committed willful perjury.

The defendant pleaded, to all the counts, not guilty, and in bar a justification that before a court of oyer and terminer the plaintiff falsely swore that a part of a store remained on the ground where it had formerly stood, and had not been removed, when, in fact, no part of the store, at the time of the plaintiff's swearing, remained there, for which an indictment was found against him. Replication, *de injuria sua propria, absque tali causa*, and issues joined thereon. Verdict was found for the plaintiff on all the pleas, which, however, was entered only on the last three counts, the others being confessedly bad, and entire damages assessed.

Caines, for the defendant, contended that the action was not maintainable. False swearing in itself is not indictable, and the addition, "for which you now stand indicted," does not make the act more criminal, as a man may be indicted and yet be innocent: *Bayly v. Churriton*, Cro. Eliz. 279; *Steward v. Bishop*, Hob. 177. There is no allegation which imputes a crime, and the innuendo will not supply the deficiency, its office being merely to designate: *James v. Rutlegh*, 4 Rep. 17; *Gurneth v. Derry*, 3 Lev. 166; *Holt v. Scholefield*, 6 T. R. 691; *Brumrig v. Hanger*, Hard. 151. This then is defect in substance which is not helped by pleading over: *Doctor Bonham's case*, 8 Rep. 120 b; *Badcock v. Atkins*, Cro. Eliz. 416; nor is it

helped by the verdict: *Rushton v. Aspinall*, Doug. 679. Entire damages have been assessed on several issues, which is bad: *Hill v. Lewis*, 1 Salk. 133; *Bedel and Moore's case*, 1 Leon 171; Lill. Ent. 428.

KENT, C. J. The last point is settled by a case in 5 Burrows. It was formerly the practice to enter separate damages on each issue, but this was found inconvenient, and in this court they have been uniformly entered as in the present case. As to the words used, they must be taken in the same sense as in common parlance they would be received. The doctrine of *mitiori sensu* has long been exploded. No man but would interpret the expression in the declaration as conveying a charge of perjury.

Emott, for the plaintiff, urged that the allegation of being forsworn followed by the same expression as in this case was held actionable in *Gilbert v. Rod*, 3 Bulst. 304; that if it were otherwise, the pleading and verdict would make it good: *Drake v. Corderoy*, Sir W. Jones, 307; Cro. Car. 288; *Tuke and Condies Case*, cited in *Osborne v. Brooke*, Alleyn, 7.

By Court, SPENCER, J. The first inquiry will naturally relate to the charge in the three last counts. The office of an innuendo is to contain and design the person who was named in certain (allegations) before. "It cannot alter the matter or sense of the words themselves." It cannot extend the words by an imagination of an intent not apparent by any precedent words to which the innuendo should refer; "in effect it stands in lieu of a *prædictum*." This doctrine is laid down in the case of *James v. Rutlegh*, 4 Rep. 17, and has been the received law ever since. In the case of *Oldham v. Peake*, 2 W. Bl. 961, it is decided that an innuendo cannot introduce new matter, but may ascertain the meaning of the old. In that case the declaration stated a *colloquium* concerning the death of Daniel Dolly; the words were, "You are a bad man, and I am thoroughly convinced you are guilty (meaning of the murder of the said Dolly), and rather than you should want a hangman, I would be your executioner." The court held that the word "death" must be understood to mean "murder," because it was such a death as the plaintiff might be liable to be hanged for. This authority bears strong analogy to the present case. The words charge the plaintiff with swearing knowingly to a "damned lie, for which he stood indicted." The words in this instance can mean nothing less than perjury; for it was an allegation that the plaintiff ha-

knowingly sworn to such a lie as rendered him obnoxious to an indictment, which could only be for perjury. If the innuendo was not true, it was competent to the jury to say so; but they have affirmed it on grounds which strike me as substantial.

The plaintiff's counsel has called in to his aid the plea of justification, as rendering the intent to charge perjury clear and certain; and there are authorities which seem to sanction a reference to a plea with that view; but I cannot accede to the doctrine. The case of *Babcock v. Atkins*, Cro. Eliz. 416, appears to me to be most consistent with principle. The court here held that the declaration, which was insufficient in substance, could not be helped by the plea. The question in that case was, as to the certainty of the person slandered, and the plea justified the words, and still the declaration was held bad. The plaintiff, to sustain an action, must have a complete right to bring it at its commencement. But, on the former ground, my opinion is, that the defendant take nothing by his motion. I think the pleadings in this case highly censurable. Instead of one plea of justification to all the counts, there are the same pleas to each count. There are also nine counts for substantially the same words, and a special replication to each of the pleas. The attorneys on both sides are in fault, and in the taxation of costs the plaintiff ought to be allowed for only two of his counts, and one replication; and the defendant's attorney, as against his client, to be allowed but for one of his special pleas.

KENT, C. J. I concur in the opinion delivered.

LIVINGSTON, J., was of opinion that judgment should be arrested.

THOMPSON, J., not having heard the argument, gave no opinion.

TOMPKINS, J., had been concerned.

Motion denied.

See the case of *Hopkins v. Beedle* (*ante*, 191).

STAATS v. TEN EYCK'S EXECUTORS.

[3 CASES, 111.]

DAMAGES FOR BREACH OF COVENANTS IN DEED. — In an action for a breach of covenants of seisin and quiet enjoyment, the measure of damages, in case of eviction, is the value of the land at the time of sale, represented by the consideration paid, with interest thereon, from the time the plaintiff loses the *meane profita*.

RECOVERY OF COSTS. — The damages will include the costs which the plaintiff sustained in the action of eviction, but not the costs of the action for *mesne profits*.

ACTION upon the covenants in a deed. The facts were: On the seventh of January, 1793, the testator, Barent Ten Eyck, by indenture of release, in consideration of seven hundred pounds, granted, bargained, and sold to the plaintiff, and one Dudley Walsh, in fee, two lots of ground in the city of Albany, covenanting, "That he, the grantor, was the true and lawful owner; that he was lawfully and rightfully seised, in his own right, of a good and indefeasible estate of inheritance in the premises; that he had full power to sell in fee-simple, and that the grantees should forever peaceably hold and enjoy the premises without the interruption of eviction or any person whatever, lawfully claiming the same." In May following, Walsh, for a valuable consideration, conveyed his moiety of these lots to Staats, who, on the thirtieth October, 1802, after due possession, by lease and release, granted one of them to Margaret Chim in fee, and covenanted to warrant and defend her in the peaceable possession thereof. In August, 1803, ejectment was brought against Margaret Chim, in which a judgment was obtained for a moiety of the lot sold to her, execution sued out, and this followed by a recovery in an action for the *mesne profits*. The value of the lot, from the moiety of which Margaret Chim was thus evicted, was, at the time of the sale by Ten Eyck, three hundred pounds, which was the consideration paid for it. Margaret Chim then brought her action against the plaintiff, and recovered for the moiety she had lost.

Upon these facts, which were submitted without argument, the following questions were raised for the determination of court: 1. Whether the plaintiff was entitled, under the covenants in Ten Eyck's release, to recover any more than a moiety of the consideration money paid for the lot from which Margaret Chim was evicted; 2. Whether the interest of that consideration, and the increased value of the premises from the

date of the deed to Margaret Chim, ought to be added; 3. Whether the plaintiff was entitled to any reimbursement for the costs and damages he had sustained by the eviction and recoveries before mentioned.

KENT, C. J. This case resolves itself into these two points for inquiry: 1. Whether, upon the covenants, the plaintiff be entitled to recover the value of the moiety of one lot at the time of eviction, or only at the time of the purchase, and to be ascertained by the consideration given; 2. If the latter be the rule of damages, then whether the plaintiff be also entitled to recover interest upon the purchase money, and the costs of the eviction.

1. There are two covenants contained in the deed; the one, that the testator was seised in fee, and had good right to convey; the other, that the grantee should hold the land free from any lawful disturbance or eviction. The present case does not state distinctly whether the eviction was founded upon an absolute title to a moiety of one lot, or upon some temporary incumbrance. But I conclude from the manner of stating the questions, and so I shall assume the fact to be, that the testator was not seised of the moiety so recovered when he made the conveyance, and had no right to convey it. The last covenant cannot then, in this case, have any greater operation than the first, and I shall consider the question as if it depended upon the first covenant merely.

At common law, upon a writ of *warrantia chartae*, the demandant recovered in compensation only the value for the land at the time of the warranty made; and although the land had become of increased value afterward, by the discovery of a mine, or by buildings, or otherwise, yet the warrantor was not to render in value according to the then state of things, but as the land was when the warranty was made: Bro. Abr. tit. Voucher, pl. 69; Id. tit. Recover in Value, pl. 59; 22 Vin. 144-6; Tb. pl. 1, 2, 9; Up. pl. 1, 2, 3; 1 Reeves' Eng. Law, 448. This recompense in value, on *excambium*, as it was anciently termed, consisted of lands of the warrantor, or which his heir inherited from him, of equal value with the land from which the feoffee was evicted: Glanville, 1, 3c, 4; Bracton, 384a, b. That this was the ancient and uniform rule of the English law is a point, as I apprehend, not to be questioned; yet, in the early ages of the feudal law on the continent, as it appears, Feudorum, lib. 2, tit. 25, the lord was bound to recompense his vassal on eviction, with other lands equal to the value of

the feud at the time of eviction: "*feudum restituat ejudem estimationis quod erat tempore rei adjudicatæ.*" But there is no evidence that this rule ever prevailed in England; nor do I find in any case that the law has been altered since the introduction of personal covenants, to the disuse of the ancient warranty. These covenants have been preferable, because they secure a more easy, certain and effectual recovery. But the change in the remedy did not affect the established measure of compensation, nor are we at liberty now to substitute a new rule of damages from mere speculative reasoning, and that, too, of doubtful solidity. In warranties upon the sale of chattels the law is the same as upon the sale of lands, and the buyer recovers back only the original price: 1 H. Bl. 17. This is also the rule in Scotland as to chattels: 1 Ersk. 206. Our law preserves in all its branches symmetry and harmony upon this subject. In the modern case of *Flureau v. Thornhill*, 2 W. Bl. 1078, the court of king's bench laid down this doctrine, that upon a contract for a purchase of land, if the title prove bad, and the vendor is without fraud incapable of making a good one, the purchaser is not entitled to damages for the fancied goodness of his bargain. The return of the deposit money with interest and costs was all that was to be expected.

Upon the sale of lands the purchaser usually examines the titles for himself, and in case of good faith between the parties, and of such cases only I now speak, the seller discloses his proofs and knowledge of the title. The want of title is, therefore, usually a case of mutual error, and it would be ruinous and oppressive to make the seller respond for any accidental or extraordinary rise in the value of the land. Still more burdensome would the rule seem to be if that rise was owing to the taste, fortune or luxury of the purchaser. No man would venture to sell an acre of ground to a wealthy purchaser without the hazard of absolute ruin. The hardship of this doctrine has been ably exposed by Lord Kames, in his examination of a decision in the Scotch law, that the vendor was bound to pay according to the increased value of the land: 1 Kames Eq. 284-303; 1 Ersk. 206.

If the question was now *res integra*, and we were in search of a fit rule for the occasion, I know of none less exceptionable than the one already established. By the civil law, the seller was bound to restore the value of the subject at the time of eviction, but if the thing had been from any cause sunk below its original price, the seller was entitled to avail himself of this,

and pay no more than the thing was worth; for the Roman law, with its usual and admirable equity, made the rule equal and impartial in its operation. It did not force the seller to bear the risk of the rise of the commodity without also taking his chance of its fall: Dig. lib. 21, tit. 2, 1, 78; Id. 1, 66, s. 3; Id. 1, 64, s. 1. So far the rule in that law appeared at least clear and consistent, but, with respect to beneficial improvements made by the purchaser, the decisions in the code and pandects are jarring and inconsistent with each other, and betray evident perplexity on this difficult question: Dig. lib. 19, tit. 1, 45, s. 1; Cod. lib. 8, tit. 45, 1 q, and Perezius thereon. The more just opinion seems to be that the claimant himself, and not the seller, ought to pay for them, for *nemo debet locupletari aliena jactura*, and this rule has, according to Lord Hardwicke, been several times adopted and applied by the English court of chancery: *East India Company v. Vincent*, 2 Atk. 38. While on this question, I hope it may not be deemed altogether impertinent to observe that in the late digest of the Hindoo law, compiled under the auspices of Sir William Jones, the question before us is stated and solved with a precision at least equal to that in the Roman code, and it is in exact conformity with the English law. On a sale declared void by the judge, for the want of ownership, the seller is to pay the price to the buyer. And what price? asks the Hindoo commentator. Is it the price actually received, or the present value of the thing? The answer is, the price for which it was sold; the price agreed on at the time of the sale, and received by the seller; and this price shall be recovered, although the value may have been diminished: 1 Colebrook's Digest, 478, 479. Before I conclude this head, I ought to observe that in the present case it does not appear that any beneficial improvements have been made upon the premises since the purchase by the plaintiff, and although some of my observations have been more general than the precise facts in the case required, yet the opinion of the court is not intended to be given, or to reach beyond the case before us.

2. The next point arising in this case is, whether the plaintiff is entitled to recover interest upon the purchase money and the costs of eviction. It is evident that originally the vendee recovered only what was deemed equivalent to the purchase money, without interest; for he recovered other lands equal only in value to the lands sold at the time of the sale. The rule would have been the same at this day, had not the action for mesne profits been introduced, which takes away from the pur-

chaser the intermediate profits of the land. As long as he was permitted to reap the rents and profits, they formed a just compensation for the use of this money. Whether the action for mesne profits has not been carried too far in our law by extending it to all cases, instead of confining it to a *mala fide* possession, it is now too late to inquire. I should have strong doubts, at least, upon the present rule if the question was new, but considering it as the established rule that the action for mesne profits lies generally, I am of opinion that the seller is as generally bound to answer for the interest of the purchase money, and that the interest ought to be commensurate, in point of time, with the legal claim to the mesne profits. This right to interest rests on very plain principles. The vendor has the use of the purchase money, and the vendee loses the equivalent by the loss of the mesne profits. The interest ought to commence from the time of the loss of the mesne profits. That time is not specifically stated in the present case, and the presumption is that they were recovered from the date of the plaintiff's purchase, and from that time, I think, the interest ought to be calculated on the consideration sum.

As to the costs of suit attending the eviction stated in the case, it is very clear that the defendants are responsible under the covenant, for the testator was bound to defend and protect the plaintiff and his assigns in the title he had conveyed. At common law he might have been vouched to come in, and then substituted as a real defendant in the suit. But the defendants are not answerable for the costs of the suit for mesne profits, as there the testator was not bound to defend. My opinion, accordingly, is, that the plaintiff in the present case is entitled to recover the consideration paid for the moiety of the lot evicted, together with interest thereon from the date of the purchase, and the costs of suit in ejectment for the recovery of the same.

The other judges concurred.

Judgment for the plaintiff.

See the case of *Horsford v. Wright*, 1 Am. Dec. 8, and the note thereto, where the same subject is considered. In the note it is shown that this case is a leading one, and the rule as to the measure of damages laid down here is that generally adopted. See also for a similar point: *Drury v. Shumway*, 1 Am. Dec. 704.

VAN RAUGH v. VAN ARSDALN.

[3 CAINES, 154.]

DISCHARGE UNDER INSOLVENT LAW OF ANOTHER STATE.—The discharge under the insolvent law of one state is no bar to a suit in another by a citizen of the latter for a debt contracted within it, and who has not in any degree come in under the proceedings of the insolvent law of the former state.

ASSUMPSIT by the indorsee against the indorser of a promissory note made in Rhode Island and indorsed to the plaintiff, then and since a resident of New York state by the defendant, who at the time of the indorsement was in New York, but was then and since a resident of Pennsylvania, under the insolvent laws of which state he was discharged in March, 1805. He did not include this indorsement in the list of his debts. The cause was at issue long previous to his discharge.

The question submitted was whether the defendant could avail himself of the discharge in Pennsylvania as a bar to the present action.

KENT, C. J. This question arose in the case of *George B. Ewert v. William Coulthard*, which was decided in this court in January term, 1795; the plaintiff there was a citizen of this state, and the debt was contracted here; the defendant was a citizen of Pennsylvania, and pleaded a discharge under the insolvent act of that state, and the plea was overruled. Upon the authority of that decision we are of opinion that the discharge stated in the case before us is no bar, and that the plaintiff is entitled to judgment. We give no opinion as to the operation of such a discharge if the parties had been citizens of Pennsylvania, or if the debt had been contracted there; or if the plaintiff had given his assent to the proceedings under the insolvent law, or accepted any dividend of the defendant's estate; but confining ourselves to the case before us, and to the antecedent decision, we declare only that a discharge under the insolvent act of another state will not take away the right of a citizen of this state to sue here upon a contract made here, and which is binding by our laws.

LIVINGSTON, J. Supposing this question to be *res integra* here (which must also have been the understanding of the counsel of both parties), I had formed an opinion and assigned my reasons at considerable length in favor of the defendant; having no doubt after a very careful examination of the subject that a

cessio bonorum under the laws of a state where the debtor has his permanent domicile, ought to operate as a discharge from his creditors in every part of the world. To this opinion, which is the result of much reflection and research, I still adhere; but being recently informed that a different decision has been made by this court in the case mentioned by the chief justice, I do not think myself at liberty to dissent from the judgment just rendered.

Judgment for the plaintiff.

PENNY v. THE NEW YORK INSURANCE COMPANY.

[3 CASES, 155.]

EXPENSES DURING EMBARGO NOT SUBJECT OF GENERAL AVERAGE.—

The charterer of a ship at so much per month cannot, on an insurance on his cargo, recover expenses occasioned during an embargo; such not being the subject of a general average and not embraced by the terms of the policy.

ASSUMPT on a policy of insurance on a cargo valued at four thousand dollars. The vessel was chartered to the plaintiffs for the voyage insured, at four hundred dollars per month. The day after her homeward cargo was taken in, an embargo was laid, lasting two months and six days, at the end of which time she sailed on her return voyage. While on her return the assured, not having learned of the removal of the embargo, made their abandonment, which was not accepted, and shortly after the vessel safely arrived.

The plaintiffs originally claimed for a total loss and sixteen hundred dollars for four months' hire of the vessel from first commencing to load until her return, including her detention under the embargo; and a verdict was taken for the plaintiffs upon an account stated, subject to the opinion of the court. But learning of the decision in the case of *Church v. Bedient et al.* (see note *infra*), they gave up their claim to recover as for a total loss, yet contended that they were entitled to compensation to the amount paid under the charter party during the embargo.

Colden, for the plaintiffs.

Harison, for the defendant.

By Court, LIVINGSTON, J. The subject insured not being abandoned until it was in safety, that is, until three days after

the embargo was removed, the plaintiffs, although ignorant of its liberation, cannot consistently with the judgment of the court for the correction of errors in *Church v. Bedient, et al.* recover as for a total loss; nor can we on the facts here disclosed, ascertain what is due to them for a partial loss, admitting a demand of that kind to be well founded. If entitled to anything, it is to the defendant's proportion of a general contribution toward reimbursing them for a sum which, as owners of the cargo, they paid in consequence of certain extraordinary expenses that accrued during the embargo; but to make a calculation, we should know the value of sloop, freight and cargo. This not appearing, it is impossible so to modify the verdict as to do complete justice. If this cannot be done, it is said that as this suit was brought in consequence of a former judgment rendered by this court, which has since been reversed, the parties should be permitted to go to a new trial to ascertain the value of these different subjects, and the extent of the defendant's liability on the principle of a general contribution. This is reasonable, and I should readily accede to it were the defendants chargeable with anything on this policy; but thinking otherwise, it is our duty to arrest the suit here, and not expose them to the expense of further litigation. It seems to have been conceded on the argument, that the plaintiffs, having contracted for freight by the month, were bound to pay even for the time the vessel was embargoed. This may be so; but I am inclined to think that a detention of this kind, by a foreign prince, suspends the contract, whether freight be payable for the whole voyage, or by the month. Demurrage is certainly not payable during such restraints, and Pothier, N. 85, tom. 2, p. 399, in his treatise on charter-parties, says, expressly, that "the owner of a vessel hired by the month is not entitled to freight during an embargo." Without, however, deciding a point which has not been made, and admitting the sum thus paid to have been justly due, the defendants cannot be called on to refund any part of it. This will necessarily lead to an inquiry, whether the expenses arising out of a state of embargo are to be defrayed by common contributions, or whether they be subjects to a particular average. That they are of the latter description has been decided, after solemn argument, by the whole court of king's bench, in the case of *Robertson v. Ewer*, 1 T. R. 127, where it was held that wages and provisions, during an embargo, were not covered by a policy on the ship. This may be supposed inconsistent with our decision in the case of *Leavenworth v. Dela-*

field (*ante* 201), and therefore as not forming a rule in the present case. But the two decisions are perfectly reconcilable; otherwise for the sake of uniformity, the latter should be followed, unless manifestly incorrect, however respectable the other may be. There is an evident distinction between a detention by capture and an embargo. In the former case, the charter-party is dissolved, and the captain (who is generally agent of all parties, to act for the best under every misfortune), reclaims both vessel and cargo, and without being under contract, or obliged so to do, retains the crew, for the purpose of preventing an entire loss, and pursuing the voyage, if the property be acquitted; whereas, he might dismiss them at once, and the underwriter be called on for a total loss. The expenses, therefore, incurred by a claim of this nature, being evidently for the general benefit, if not impliedly at the general request, and not the effect of previous stipulation or contract, which is at an end by the capture, it is but reasonable they should be defrayed in the same way. Ricard, in his treatise on the Commerce of Amsterdam, assigns nearly the same reason for making a general average of wages in case of capture, and a particular average of them during an embargo: P. 279. "The wages of a ship," says he "detained by an order of state, shall not be brought into general average as in case of capture; because, in the latter case, the crew remain to take care of the vessel whilst she is reclaiming, and these charges are occasioned with the sole view of preserving the ship and cargo for the proprietors; but there is no room for such pretense in the case of an embargo; as the sovereign who lays it neither claims the ship or cargo, but only for political reasons prevents their immediate departure: Therefore, it cannot be said that the ship's company remained on board to prevent an entire loss." The French ordinance declares that such charges, during an embargo, shall be reputed as general average, if the vessel be hired by the month, but if freighted by the voyage, they shall be borne by her alone. Pothier, in his treatise above referred to, assigns a reason for this distinction, which is not very satisfactory, and therefore, I shall not repeat it. From Emerigon, vol. 1, 631, we also learn that there are foreign writers, although there be a diversity of opinion among them, who hold all expenses consequential on an embargo as particular averages. In this way, a person who has insured one species of property can never be called on to make good a particular damage which may have happened to another, nor exposed to a loss not within the risk which he has

assumed. On what pretense, then, can an owner of a cargo call on its underwriter to make good any extra freight he may have paid for the carriage of it? He does not undertake that the voyage shall be short or interrupted, but only that goods shall eventually arrive safe; and whether the transportation cost more or less, is a matter with which he has nothing to do. Whether the vessel encounter a tempest, or be embargoed in her way (if no abandonment be made during the detention), is to him of no consequence, so that the goods finally arrive, as was the case here, without damage, at their destined port. I am, therefore, for adopting the English rule in the case of an embargo, not on the ground of authority, the decision being posterior to the revolution, but as the most reasonable; the most conformable to the understanding of the different classes of underwriters; the best calculated to prevent confusion and embarrassment, and the most likely to throw upon each the loss which the particular subject insured by him has sustained. Whether, therefore, the present plaintiffs were liable for freight or not during the embargo, my opinion is, that they have no claim on the defendants, who underwrote their goods, for any part of it, and that judgment be rendered accordingly.

Judgment for the defendants.

The facts in the case of *Church v. Bedient*, 1 Caines' Cas. 21, were: The policy was effected on the ship for five thousand dollars. She was captured on the nineteenth of January, acquitted on the twentieth of February, and restored to the captain with freight amounting to two thousand dollars. He then refitted and repaired her at an expense of only eight hundred dollars, and proceeded on his voyage. On the fifth of March the insured, not knowing of the restoration, abandoned as for a total loss. When the case was tried, Radcliff, J., charged, that as the insurer on the fifth of March, when the abandonment was made, was ignorant of the fact of restoration, he had a right to abandon and claim for a total loss. On an appeal to the court of errors it was decided that the insured, although ignorant of the fact of restoration, could not recover for a total loss, and was only entitled to recover according to the final events. Lansing, chancellor, delivering the opinion of the court, said: "In most occasions of maritime insurances, the remoteness of the owners from the subjects insured effectually precludes from a direct personal agency in its management, on the spot to which it may be conveyed, by any of the incalculable variety of incidents to which this species of adventure is so pre-eminently exposed. To obviate some of the inconveniencies arising from this circumstance, they are sometimes permitted to act upon the best information they are able to acquire of the actual situation of the subject insured, and to make such information the basis of the rights they intend to assert, in consequence of the occurrence of any of those accidents, which in their effect produce either a technical or an actual total loss. But certainly, if the information is either totally unfounded or materially variant from the truth, it would be

a strange position to maintain that its resemblance should be preferred to the truth itself. If the insurers and insured had been at the port to which the captors carried the brig, an abandonment, under all the circumstances of this case, could not have been permitted; for at the time it was made the vessel was restored and prosecuting its destined voyage. From the mere act of abandonment no positive right can be derived to the insured, unless it be combined with a total loss; for if the loss should, in the final event, prove an average instead of a total loss, the act of abandonment would be nugatory."

PIERSON v. POST.

[3 CALDER, 175.]

PROPERTY IN WILD ANIMALS.—Pursuit alone gives no right of property in animals *feræ naturæ*; and an action will not lie against a man for killing and taking an animal of this kind, pursued by and in view of the person who first found, started, pursued, and was on the point of taking it.

SAME, HOW ACQUIRED.—Occupancy in wild animals can be acquired only by possession, but this possession does not imply actual bodily seizure, but there must be some actual dominion over the animals, as ensnaring them, or by other such means which will prevent their escape.

TRESPASS on the case commenced in the justice's court by the present defendant. The declaration stated that Post, while hunting, chasing, and pursuing a fox with his dogs, and when in view of the animal, Pierson, knowing the fox was so hunted and pursued, did, in sight of Post, kill and carry it off. A verdict was rendered in favor of the plaintiff below; whereupon the defendant sued out a *certiorari*, assigning as error that the declaration and the matters therein stated were not sufficient to maintain the action.

Sanford, for the present plaintiff, contended that Post had no right in the fox which could be the subject of an injury; that animals *feræ naturæ* belong to no one, and to create a title in such an animal occupancy is indispensable: 2 Bl. Com. 403; that a taking was necessary, and even then the natural liberty may be regained: Just. lib. 2, tit. 1, s. 12; nor will wounding give a right of property in an animal not reclaimed: Id. s. 13; Fleta, b. 3, p. 175; Bracton, b. 2, c. 1, p. 86.

Colden, for the defendant, insisted that manucaption was not the only occupancy that would give a right of property in animals *feræ naturæ*: Puffendorf's Law of Nature and Nations, b. 4, c. 4, s. 5, n. 6, by Barbeyrac; Id. s. 2, n. 2; Id. s. 7, n. 2. Any continued act which declares the intention of exclusively

appropriating the animal is equivalent to occupancy. Pursuit is such an act, and while it is kept up, ought to be respected as much as manucaption itself.

By Court, TOMPKINS, J. This cause comes before us on a return to a *certiorari* directed to one of the justices of Queen's county. The question submitted by the counsel in this cause for our determination is, whether Lodowick Post, by the pursuit with his hounds in the manner alleged in his declaration, acquired such a right to or property in the fox, as will sustain an action against Pierson for killing and taking him away. The cause was argued with much ability by the counsel on both sides, and presents for our decision a novel and nice question. It is admitted that a fox is an animal *feræ naturæ*, and that property in such animals is acquired by occupancy only. These admissions narrow the discussion to the simple question of what acts amount to occupancy, applied to acquiring right to wild animals.

If we have recourse to the ancient writers upon general principles of law, the judgment below is obviously erroneous: Justinian's Institutes, lib. 2, tit. 1, s. 13, and Fleta, lib. 3, c. 2, p. 175, adopt the principle that pursuit alone vests no property or right in the huntsman; and that even pursuit, accompanied with wounding, is equally ineffectual for that purpose, unless the animal be actually taken. The same principle is recognized by Bracton, lib. 2, c. 1, p. 8. Puffendorf, lib. 4, c. 6, s. 2 and 10, defines occupancy of beasts *feræ naturæ*, to be the actual corporal possession of them, and Bynkershock is cited as coinciding in this definition. It is indeed with hesitation that Puffendorf affirms that a wild beast mortally wounded, or greatly maimed, cannot be fairly intercepted by another, whilst the pursuit of the person inflicting the wound continues. The foregoing authorities are decisive to show that mere pursuit gave Post no legal right to the fox, but that he became the property of Pierson, who intercepted and killed him.

It, therefore, only remains to inquire whether there are any contrary principles or authorities to be found in other books, which ought to induce a different decision. Most of the cases which have occurred in England, relating to property in wild animals, have either been discussed and decided upon the principles of their positive statute regulations, or have arisen between the huntsman and the owner of the land upon which beasts *feræ naturæ* have been apprehended; the former claiming them by title of occupancy, and the latter *ratione soli*. Lit-

the satisfactory aid can, therefore, be derived from the English reports.

Barbeyrac, in his notes on Puffendorf, does not accede to the definition of occupancy by the latter, but on the contrary affirms that actual bodily seizure is not, in all cases, necessary to constitute possession of wild animals. He does not, however, describe the acts which, according to his ideas, will amount to an appropriation of such animals to private use, so as to exclude the claims of all other persons, by title of occupancy, to the same animals; and he is far from averring that pursuit alone is sufficient for that purpose. To a certain extent, and so far as Barbeyrac appears to me to go, his objections to Puffendorf's definition of occupancy are reasonable and correct. That is to say, that actual bodily seizure is not indispensable to acquire right to or possession of wild beasts; but that, on the contrary, the mortal wounding of such beasts, by one not abandoning his pursuit, may, with the utmost propriety, be deemed possession of him; since thereby the pursuer manifests an unequivocal intention of appropriating the animal to his individual use, has deprived him of his natural liberty, and brought him within his certain control. So also encompassing and securing such animals with nets and toils, or otherwise intercepting them in such a manner as to deprive them of their natural liberty, and render escape impossible, may justly be deemed to give possession of them to those persons who, by their industry and labor, have used such means of apprehending them. Barbeyrac seems to have adopted and had in view in his notes the more accurate opinion of Grotius with respect to occupancy. That celebrated author, lib. 2, c. 8, s. 3, p. 309, speaking of occupancy, proceeds thus: "*Requiritur autem corporalis quaedam; possessio ad dominium adipiscendum; atque ideo, vulnerasse non sufficit.*" But in the following section he explains and qualifies this definition of occupancy: "*Sed possessio illa potest non solis manibus, sed instrumentis, ut decipulis, ratibus, laqueis dum duo adsint; primum ut ipsa instrumenta sint in nostra potestate, deinde ut fera, ita inclusa sit ut exire inde nequeat.*" This qualification embraces the full extent of Barbeyrac's objection to Puffendorf's definition, and allows as great a latitude to acquiring property by occupancy, as can reasonably be inferred from the words or ideas expressed by Barbeyrac in his notes. The case now under consideration is one of mere pursuit, and presents no circumstances or acts which can bring it within the definition of occupancy by Puffendorf or Grotius, or the ideas of Barbeyrac upon that subject.

The case cited from 11 Mod. 74-130, I think clearly distinguishable from the present; inasmuch as there the action was for maliciously hindering and disturbing the plaintiff in the exercise and enjoyment of a private franchise; and in the report of the same case, 3 Salk. 9, Holt, C. J., states that the ducks were in the plaintiff's decoy pond, and so in his possession, from which it is obvious the court laid much stress in their opinion upon the plaintiff's possession of the ducks, *ratione soli*.

We are the more readily inclined to confine possession or occupancy of beasts *feræ naturæ* within the limits prescribed by the learned authors above cited, for the sake of certainty and preserving peace and order in society. If the first seeing, starting or pursuing such animals without having so wounded, circumvented or ensnared them so as to deprive them of their natural liberty and subject them to the control of their pursuer, should afford the basis of actions against others for intercepting and killing them, it would prove a fertile source of quarrels and litigation. However uncourteous or unkind the conduct of Pierson toward Post in this instance may have been, yet his act was productive of no injury or damage for which a legal remedy can be applied. We are of opinion the judgment below was erroneous and ought to be reversed.

LIVINGSTON, J., gave a dissenting opinion.

Judgment reversed.

Citing this case, Kent, 2 Com. 349, says: "It was held by the Supreme Court of New York, in *Pierson v. Post*, the pursuit alone gave no property in animals *feræ naturæ*. Almost all the jurists on general jurisprudence agree that the animal must have been brought within the power of the pursuer before the property in the animal vests. Actual taking may not in all cases be requisite, but all agree that mere pursuit without bringing the animal within the power of the party is not sufficient. The possession must be so far established by the aid of nets, snares, or other means, that the animal cannot escape. It was accordingly held in the case just mentioned, that an action would not lie against a person for killing and taking a fox which had been pursued by another and was then actually in view of the person who had originally found, started and chased it. The mere pursuit and being in view of the animal did not create a property because no possession had been acquired; and the same doctrine was afterward declared in the case of *Buster v. Newkirk*, 20 Johns. 75."

This case is also cited in 1 Schouler on Pers. Prop. 80. The Civil Code of California, sec. 656, provides: "Animals wild by nature are the subjects of ownership while living only when on the land of the person claiming them, or when tamed, or taken or held in possession, or disabled and immediately pursued."

HOLLINGSWORTH v. NAPIER.

[3 Caines, 182.]

RIGHT OF STOPPAGE IN TRANSITU.—A vendor delivered to the vendee a bill of parcels for goods lying in a public store, together with an order on the store-keeper for their delivery; it was held that the vendor had not the right of stoppage *in transitu* against a person purchasing *bona fide* for a valuable consideration.

FRAUD IN SALE.—Though there be some suspicious circumstances attending the purchase and transfer of property, yet if they have been fairly submitted to a jury, the court will not infer there was any fraud so as to warrant a new trial.

TROVER to recover the value of ten bales of cotton. The facts appeared as follows: The defendant had sold the cotton, then in a public store, to one Kinworthy, for cash payable on delivery, and had made a bill of parcels, which was marked "cash" in the margin, but contained no receipt for the money. This, with an order on the store-keeper for the cotton, had been given to Kinworthy by the defendant or his clerk. Kinworthy, without paying for the articles or taking possession of them, sold the bill of parcels and order to the plaintiff, at the same price for which they had been bought from defendant, and took the consideration part in cash and the residue in a check borrowed from one Peter Hyde. Hollingsworth went to the quarantine ground the next day, but at a time too late for shipping the goods that night, received the cotton upon the order, paid the storage, marked the bales with his initials, and then returned them to the public store. The following morning, the defendant took the cotton from the store-keeper and sold it. The judge charged the jury that the order to the store-keeper was a delivery; whereupon verdict was found for the plaintiff.

A motion was made to set aside the verdict, as contrary to law, and on the ground of having newly discovered that no person by the name of Peter Hyde had any account with either of the New York banks, and that the cotton had been obtained from defendant in consequence of a plan between Hollingsworth and Kinworthy, by which the latter transferred the cotton to the former to satisfy a long-existing debt, without any consideration passing at the time of the pretended sale.

Caines and Harison, for the defendant, contended that the facts in the case warranted a presumption of fraud. There was no legal right in Kinworthy, either by payment or taking possession, and he could transfer none to the plaintiff, who claimed

by virtue of the order to the store-keeper. This order, not being negotiable, is subject to all the equities that might have been urged against Kinworthy; and the right of stoppage *in transitu* existed in full force: *Cowper v. Andrews*, Hob. 41; *Burghall v. Howard*, 1 H. Bl. 365 n; *Openhein v. Russell*, 3 B. & P. 49.

Woods and Hoffman, for the plaintiff, argued that fraud was a question of fact; that the facts in this case were not deemed by the jury to constitute a fraud, and they were the judges. The order to the store-keeper was equivalent to an actual delivery: 1 Lex. Mer. Amer. 376, 377. But in any event, the plaintiff is a *bona fide* purchaser, and is protected by the delivery to Kinworthy: *Lickbarrow v. Mason*, 1 H. Bl. 363; *Abbott*, 314.

By Court, SPENCER, J. The court are applied to for a new trial in this cause, on the facts stated in the case, and on discovery of new evidence. The plaintiff derives his title to the goods in controversy under Kinworthy, and the questions are, whether his fraud infects the plaintiff's title; whether possession followed the sale, so as to destroy the defendant's right to stop the goods *in transitu*; and whether the case is free from the operation of the statute of frauds.

The question of fraud was fairly submitted to the jury. Their verdict shows that they believed the plaintiff, from the evidence before them, was not a party in Kinworthy's fraud on the defendant, and we cannot perceive any reasons for questioning the conclusions drawn by the jury. Fraud is odious, and never to be presumed. The circumstances set up, on which it is to be founded, are too light and evanescent. On this point, therefore, the defendant's application fails.

The plaintiff having, as it must now be intended, fairly gotten possession of the order for the cotton, received a delivery of it, and paid the storage. This acquiring of possession took away the defendant's right to stop *in transitu*. The order itself is a delivery, so as to prevent the operation of the statute: *Searle v. Keeves*, 2 Esp. 598. But, again, the sale is wholly free from that objection, by the delivery of possession under it. With respect to the facts upon which the defendant relies for a new trial, on the discovery of evidence, it is to be observed that the former was had in December last. It would be too loose to set aside the verdict on the mere expectation of a party's being better prepared. There has been abundant time for the defendant to lay before us the facts in the knowledge of his wit-

nesses. This ought to be done on all applications for new trials on discovered testimony, or, if omitted, good reason ought to be given for the omission. To listen to the application on this ground would be to grant new trials wherever the party was dissatisfied with the verdict. The facts ought to be strong ones to induce the court to grant a new trial on the discovery of evidence, and the case should be free from laches. In the present instance the defendant is chargeable with delay, and the facts that he expects to prove, for aught that appears, rests in his own credulity.

If it should be admitted that Hyde never kept an account with the banks, it does not follow that the testimony given on the trial is untrue. The witnesses did not say that Hyde drew the check, but that he loaned one. This might be, and it is to be presumed was a check drawn by some other person. Our opinion is, that the defendant take nothing by his motion.

New trial refused.

See cases on this subject: *Wood v. Roach*, 1 Am. Dec. 276; and *Parlier v. McIver*, Id. 656.

PALMER v. MULLIGAN.

[3 CASES, 307.]

WATER-COURSES—USE OF.—A riparian owner on the upper bank of a public river is not liable for building thereon, and using the water in an action by another who had long before had a beneficial use of the water, unless manifest and serious damage result from such use or enjoyment. Hence an action will not lie for diverting the water of a river from its usual course, by erecting a dam for mills, above the mills of another, if sufficient water be left to work the lower mills, though in consequence of such erection it be necessary to run the mill-dam of the lower mills further into the stream, and the difficulty of getting logs to the lower mills be increased so much as to require additional labor.

RIVER AS A PUBLIC HIGHWAY.—That portion of the Hudson river where the tide does not ebb and flow, may be held and enjoyed as private property; but it is so far a public river as to be subject to a use as a public highway.

Action on the case for erecting and continuing a nuisance, by building above the plaintiffs' mills and dams upon the Hudson river, at Stillwater, Saratoga county, thereby diverting the water from its accustomed course, and from the plaintiffs' mills and dams, in consequence whereof they had not sufficient water

for working. The declaration also alleged that the rafting of timber into plaintiffs' dam had been obstructed; and that the rubbish from defendants' dam had been carried into the sluiceway of the plaintiffs, by means whereof it was choked up, so that they lost the benefit of their mills.

It appeared in evidence that the plaintiffs' mills, consisting originally of a grist and saw-mill, were erected upon their own ground forty years ago; that they were burned down and rebuilt within a year; that the saw-mill was a second time destroyed by fire, but not reconstructed till seven or eight years had elapsed, though there was some testimony that the grist-mill had been worked from time to time. A year or two before the saw-mill was again built, defendants erected their mill and dam about two hundred yards above those of the plaintiffs. In consequence of defendants' dam plaintiffs were obliged to run theirs further into the stream; even then the current was so turned off into the river as to endanger the loss of many logs, necessitating additional aid of one hand to every twenty-five logs; and the rubbish from the defendants' mills injured the plaintiffs to the amount of about eight shillings a day. On the application of plaintiffs to defendants for a way through the latter's dam, so that plaintiffs' logs might be more easily and cheaply reclaimed, such way was refused.

The jury found for the defendants, and a motion was made to set aside the verdict as against evidence, and on the ground of newly discovered testimony, which, however, it appeared might have been obtained on the first trial.

Emott, for the plaintiffs, contended that the Hudson was not a public river in the sense that would make their mills a nuisance, so that they could have no action for an injury thereto. Rivers are navigable and not navigable; the former, extending as high as the sea ebbs and flows, belonging to the government; the latter, where there is no ebb and flow, and belonging to the land-holders on each side: *Fishery of the Banne*, Davis, 56; Lord Hale's *De Portibus Maris*, Harg. Tracts, 5. At Stillwater there is no ebb and flow of the tide, and the property in the river must be in the plaintiffs, though they claim no right to stop navigation. Defendants are entitled to run a dam from their shore, provided it be done so as not to injure lower mills in the accustomed use of the water: *Brown v. Best*, 1 Wils. 174; *Duncomb v. Sir Edward Randall*, Hettley, 34. Nor, for the protection of this right, need the mills be ancient, except in cases of prescription: *Palms v. Heblethwait*, Skin. 65;

Cox v. Mathews, 1 Vent. 237; *Rulland v. Bowler*, Palm. 290. Were it necessary for the plaintiffs to show a grant of the stream, it would be presumed after an occupation of forty years: Bull. N. P. 75; *Darwin v. Upton*, 3 T. R. 159; and the fact that their mills had been burned down could not impair their title: *Palmis v. Heblethwait*, 2 Show. 261; *Luttrell's case*, 4 Rep. 86, 87.

Fbot, for the defendants, contended that the lapse of time before the plaintiffs attempted to rebuild their mills amounted to an abandonment and a relinquishment of their right to the water; that the authorities cited apply to mills on private streams, whereas the Hudson, at Stillwater, is a public river.

SPENCER, J. A motion has been made on the part of the plaintiffs for a new trial, on two grounds: 1. That the verdict is against the weight of evidence; and 2. On discovery of new evidence.

The plaintiffs' witnesses generally accorded in saying that the only injury to the plaintiffs by the erection of the defendants' dam is this, that it occasioned additional labor and expense to the plaintiffs to carry logs into their dam. None of them pretend that there has been any diversion of the water since the defendants erected their dam, which was seven or eight years ago. Some of the plaintiffs' witnesses think the rubbish increased in the plaintiffs' dam since the erection of that of the defendants; others think it not increased. It is conceded that the plaintiffs and defendants own the lands respectively on the banks of the river opposite their mills and dams.

Whether the Hudson river be considered as a public highway, or the bed of it as belonging to the owners of the adjacent shores, will not, I think, vary the result. I cannot, however, but consider it as a common highway; independent of its being navigable with small craft and rafts above the place in dispute, the legislature have constantly considered this river as public and common to all the citizens of the state above tide water and above Stillwater. They have granted islands in this river at Glen Falls and in the town of Greenwich, in Washington county. The act declaring certain waters highways not extending to this river has been considered as impliedly sanctioning the idea that it is not public property. I should draw the contrary inference, for if the legislature have declared such rivers as the Conhocton, the Unadilla, the east branch of the Chenango, and the great variety of other inland waters, public

highways as necessary to the public convenience, it must have been taken for granted that the Hudson river was already a public highway and needed not an act declaring it to be so. If, then, this river is to be deemed a highway, the erection of both dams are nuisances, and it is questionable whether the plaintiffs can, without right or title, complain that the defendants' nuisance is injurious to their nuisance; but on this point it is unnecessary to express an opinion.

If this river be considered as private property, belonging to the owners of the adjacent shores, the plaintiffs cannot maintain their action from the evidence before us, because there is no pretense of the water's being diverted; the use of the plaintiffs' property is less commodious by the defendants' dam. The act itself in erecting the dam on the principles contended for by the plaintiffs' counsel was a lawful act; and though in its consequence slightly injurious, the plaintiffs are remediless. It would have been as tenable ground if the plaintiffs had declared on the loss of custom to their mill by the erection of the defendants'; it is a *damnum absque injuria*. The erection of dams on all rivers are injurious in some degree to those who have mills on the same stream below, in withholding the water and by a greater evaporation in consequence of an increased surface; yet such injuries, I believe, were never thought to afford a ground of action. In any and every view of the subject the verdict was legal and just. The second ground of the motion does not alter the case even if the testimony could be considered as newly discovered, and that there had been no laches on the part of the plaintiffs; but for aught that appears, John White, one of the plaintiffs, knew of this testimony and neglected to procure it. I am averse, however, to putting it all on that ground; the testimony discovered is wholly irrelevant and immaterial. In my opinion, the plaintiffs take nothing by their motion.

LIVINGSTON, J. In determining this cause, I am willing to admit that the erection of the plaintiffs' mills and dam is not only no nuisance or obstruction to the river, but a public as well as private benefit. Still, I am not satisfied of their right to recover. Whatever their pretensions to build a dam and mills adjoining their own land may have been, it must be conceded that, as far as the public are concerned, the defendants had the same right opposite their ground, provided it could be done without injury to the navigation of the river. This is not pretended to be the case, but as the plaintiffs' mills were first erected, it is said that if the defendants have any right of this

kind, they must so use it as not to injure their neighbors. Without denying this position, which is indeed become a familiar maxim, its operation must be restrained within reasonable bounds, so as not to deprive a man of the enjoyment of his property merely because of some trifling inconvenience or damage to others; of this nature is the injury now complained of, so far, at least, as it is supported by proof. It is not pretended that the water is diverted, or that less business can be now done at the plaintiffs' mills than formerly, but they are obliged to bring their logs a very little further round, in the river, in order to get them into the dam, which is the principal, if not the only inconvenience they are exposed to by the defendants' conduct. Were the law to regard little inconveniences of this nature, he who could first build a dam or mill on any public or navigable river, would acquire an exclusive right, at least for some distance, whether he owned the contiguous banks or not; for it would not be easy to build a second dam or mound in the same river, on the same side, unless at a considerable distance, without producing some mischief or detriment to the owner of the first. Were this not permitted, for fear of some inconsiderable damage to other persons, the public, whose advantage is always to be regarded, would be deprived of the benefit which always attends competition and rivalry. As well, therefore, to secure to individuals the free and undisturbed enjoyment of their property as to the public the benefits which must frequently redound to it from such use, the operation of the maxim *sic utere tuo ut alienum non lædas* should be limited to such cases only where a manifest and serious damage is the result of such use or enjoyment, and where it is very clear indeed that the party had no right to use it in that way. Hence it becomes impossible, and indeed improper, to attempt to define every case which may occur of this kind. Each must depend on its own circumstances, and the fewer precedents of this kind which are set the better. Confining myself, therefore, strictly to the case before us, my opinion is, and the jury probably proceeded on that ground, that the plaintiffs proved no injury, or one so remote and insignificant as not to justify their insisting on an abatement of defendants' dam, or damages for its erection.

If this view of the subject be correct, it will account for my passing over some points which were made on the argument, without giving an opinion on them. This I avoid doing because experience has already convinced me that it is always best in a judge to be silent on every point which he does not regard im-

portant and necessary in the decision of a cause. I will only add, that the further testimony which is expected from Schuyler, will not change what appears to me the merits of this cause. Neither, therefore, as a verdict against evidence, nor on the ground of newly discovered evidence, can I consent to a new trial.

TOMPKINS, J. I concur in the result of the opinions delivered.

THOMPSON, J. On the argument, the right of the plaintiffs to maintain an action, even admitting them to have sustained an injury, has been called in question, because, as is alleged, their mills being erected on a public river, are, in judgment of law, a nuisance. How far this allegation is founded in point of fact is not now a subject of inquiry; that is a question between the public and the plaintiffs, and cannot be tried in this collateral way: 4 Burr. 2163; Harg. Law Tracts, 8, 9. It is a fact of public notoriety, and therefore proper to assume as such, that the tide does not ebb and flow as high up the Hudson river as the place in question; and, therefore, the land under the water, is, I apprehend, as much the subject of a private grant, as the land adjoining the river, subject, however, to be used by the public for the purposes of boating and rafting, and other objects of this description, as far as shall be necessary for public use and accommodation: Harg. Law Tracts, 8, 9. These are the rules and distinctions adopted by Hargrave, and which appear to me to be just and reasonable. The right thus claimed by the plaintiffs being a subject of private and individual interest, we have only to look to the facts in the case, to see how far the plaintiffs have established this right in themselves; and without examining such facts in detail, I am warranted in saying they have all the right that may legally be presumed to result from a possession of about forty years, and which I consider amply sufficient to raise the presumption of a grant. Lord Ellenborough, in a late case decided in the court of king's bench, in England, says the general rule of law is, that, independent of any particular enjoyment used to be had by another, every man has a right to have the advantage of a flow of water in his own land, without diminution or alteration; but an adverse right may exist, founded on the occupation of another, and if this occupation has existed for so long a time as may raise the presumption of a grant, other parties must take the stream subject to such adverse right, and that twenty years' exclusive enjoyment of the water, in any particular manner, affords a pre-

sumption of right in the party so enjoying it, derived from grant or act of parliament: 6 East. 214, 215. If the rules there laid down are, as I apprehend them to be, undeniable principles of the common law, and we apply them to the present case, they will establish, beyond contradiction, the plaintiffs' right to the use of the water, in the same manner it was enjoyed before erection of the defendants' mill and dam. No presumption of right derived from a grant can attach to the defendants, they not having been in possession more than eight or ten years. If I am correct, then, with respect to the law as applicable to the case, it remains only to examine the facts touching the injury alleged to have been sustained by the plaintiffs, in order to test the propriety of the verdict. The broad question for the determination of the jury was, whether the plaintiffs had sustained any injury by the mills and dam erected by the defendants about two hundred yards above those of the plaintiffs. One cause of injury complained of was the increased difficulty of getting logs into their dam. On this subject there was no contradiction of testimony. That the upper dam would increase this difficulty, was not only fully established by the plaintiffs' witnesses, but strengthened and confirmed by those of the defendants. The injury on this account is not merely nominal, but real and permanent, and that to a very considerable extent. One of the witnesses testified that before the defendants' dam was built, the plaintiffs might bring into their dam from one hundred to one hundred and fifty logs at a time, whereas, at present, they cannot more than twenty-five, and that logs are frequently lost in getting them over or past the upper dam; that by reason thereof, within four years past, he supposed the plaintiffs had lost as much as four hundred logs, worth from thirty-five to forty pounds per hundred. Another witness, who had been a sawyer in the plaintiffs' mill, swore that it was impracticable to go round the upper dam with logs, and get into the lower dam, the course of the current being so altered that they would run past, and that being obliged to run over the upper dam, the cribs or rafts were frequently broken, and the logs lost; that the rubbish from the upper mill was a daily inconvenience to the lower one; that he never was employed twenty-four hours in sawing without clearing it away, which would not have been the case but for the upper dam, and he estimated the damage in the mere stoppage of the mill at eight shillings per day. From the testimony in the case it appears that these dams are formed by throwing wings out diagonally

into the river; that the upper dam stands on the channel, through which logs used to pass to the plaintiffs' mill; that the course of the current is thereby changed, set further out into the river, and rendered more rapid; that the upper dam made it necessary for the plaintiffs to extend theirs further into the river for the purpose of getting more water, and to enable them to bring logs into their dam, which would have been impracticable without such extension. From the whole current of testimony, I think it manifest that the plaintiffs have sustained very essential injury. If the facts in the case will warrant the presumption that the plaintiffs' right is derived from a grant, that right must be understood to secure to them the use of the water, in the manner they enjoyed it before the erection of the defendants' dam. I admit that actions of this kind ought not to be countenanced where the damages are merely nominal, or a party is put to some trifling inconvenience; but I do not consider this a case of that description; the damages here are real and permanent, and are occasioned by a diversion and alteration of the usual and ordinary current of the water. Under these circumstances I cannot think the jury confined themselves to the question of damages, but undertook to pronounce upon the law as applicable to the rights of the parties. In whatever point of light, therefore, the case is viewed, I think the verdict is both against law and evidence, and that a new trial ought to be granted.

I have not thought it necessary to say anything respecting the newly discovered testimony, because I do not consider that the evidence on the trial could afford any presumption of an abandonment, or dereliction by the plaintiffs, or those under whom they claim, of the right to the use of the water as formerly enjoyed. If any doubt, however, could arise on that subject, it would, I think, be removed by the affidavit accompanying the present application.

KENT, C. J. The first object of inquiry, as arising upon this case is, whether the facts proved by the plaintiffs will authorize a recovery.

The plaintiffs, and those from whom they derive title, own the land on the Hudson river at Stillwater, and had for upward of thirty years before the erection of the dam complained of, owned and enjoyed a grist and saw-mill upon that river. The Hudson at Stillwater is a fresh river, not navigable in the common law sense of the term, for the tide does not ebb and flow at that place. In the case of *The Royal Fishery in the river Banne*, Davis, 55, 57, it was resolved that by the rules and

authorities of the common law every river where the sea does not ebb and flow was an inland river not navigable, and belonged to the owners of the adjoining soil. This case was cited by Mr. Justice Yates in *Carter v. Murcot*, 4 Burr. 2162, as a very good case, and a solid authority, and in that latter case recognized this distinction between rivers navigable and not navigable; and in *The King v. Wharton*, 12 Mod. 510, Lord Holt laid down the same doctrine. In Sir Mathew Hale's excellent treatise, *De Jure Maris*, etc., Hargrave's Law Tracts, and which is considered by Mr. Butler as exhausting the whole law on the subject, he lays down the law generally that fresh rivers, of what kind soever, do, of common right, belong to the owners of the adjacent soil, but he admits that fresh rivers, as well as those which ebb and flow, may be under the servitude of the public interest, and may be of common or public use for the carriage of boats, etc., and in that sense may be regarded as common highways by water. Thus, he adds, that the Wey, Severn, Thames, etc., as well above as below the flowing of the tide, and as well in the parts where they are of private as of public property, are public rivers *juris publici*, and nuisances and impediments therein are liable to be punished by indictment. They are called public rivers, not in reference to the property of the river, but to the public use: Hargrave, 5, 8, 9. This is the true and just rule which harmonizes private right with the public interest. The Hudson at Stillwater is capable of being held and enjoyed as private property, but it is, notwithstanding, to be deemed a public highway for public uses, such as that of rafting lumber, to which purpose it has heretofore been, and still is, beneficially subservient. To obstruct this and other public uses of the river, by dams, etc., would be a nuisance, but of this question we have nothing to do in the present case. Whether a dam or mill be a nuisance is a question of fact which is not examinable in this present action; and if it was, there is every reason to conclude that neither of the dams or mills are nuisances from the length of time that they have been permitted to remain.

It is not stated whether the river was or was not excepted out of the grants under which the parties in this suit hold their property. The case admits that the right of the premises, whatever it is, was in the plaintiffs; and we have seen that the river at the place in question is susceptible of being granted without any public inconvenience, because the right of the public to the use of the water for navigation would remain in-

contestable. As between the parties to this suit and the question litigated by them, the water may be considered as if included in their grants, whatever the real fact may be. The defendants have clearly, therefore, no right to obstruct the plaintiffs in the enjoyment of the water. They have an equal right to build a mill on their soil, but they must so use the water and so construct their dam as not to annoy their neighbor below in the enjoyment of the same water. The plaintiffs had used and enjoyed their mills even beyond the present period of limitation in a writ of right when the defendants built their dam. It was not requisite, however, that the plaintiffs should have been able to prescribe for the enjoyment of their mills. It is sufficient that they had an interest in the water, and the defendants cannot lawfully divert the natural course of the river, or injure the plaintiffs in the exercise of their rights. A water-course doth not begin by prescription, as Whitlock, J., observes, nor yet by assent, but the same both begin *ex jure naturæ*, having taken this course naturally, and cannot be diverted. All the cases agree that the plaintiff need not aver his mill to be an ancient mill where a natural water-course is diverted: 1 Vent. 237; Skinn. 65; Palm. 290; 1 Wils. 174; 3 Bulst. 340. The fact, then, of the interruption of the use of water after the mill was burnt, and before it was rebuilt, is perfectly immaterial. The question is, have not the defendants materially and permanently injured the plaintiffs by giving a different direction to the course of the main current? Many cases may be supposed which would be *damna absque injuria*; such, for instance, as the insensible evaporation and decrease of water by dams, or the occasional increase and decrease of the velocity of a current and of the *quantum* of water below. Many such circumstances may be inevitable from the establishment of one dam above another upon the same stream. The question in such cases would turn upon the nature and extent of the injury. Here the injury is a continued and permanent one, and very material to the party. The defendants have not attempted to show that the injury was inevitable, and that they cannot have and enjoy a mill in the place they do without creating this injury. What would be the effect of this proof, if shown, would be another question; but no such defense has been attempted, and I may take it, therefore, for granted that the defendants can, if they please, so alter their dam as to be able to enjoy their mill and avoid giving the injury.

If a right of action in the plaintiffs be assumed, I think this a case proper for the interference of the court. The verdict is clearly against evidence. The plaintiffs had eight witnesses who established the fact that the dam and mills of the defendants did materially injure and disturb the plaintiffs. One witness estimated the damage from ninety to one hundred dollars a year. The four witnesses on the part of the defendants do not attempt any direct contradiction of this fact. They prove only that the plaintiffs had felt inconveniences before the erection of the defendants' dam, but they do not deny but that these inconveniences have been increased.

For these reasons I am of opinion that the verdict ought to be set aside.

New trial refused.

This case is extensively cited by writers when treating of the use and property in water-courses. It is cited by Angell in sections 11, 116, 134, 178, 545, and 546, in his excellent work on Water-courses. The courts in New York have frequently referred to it and given an exposition of it on several occasions, and it will be instructive to note here what has been remarked regarding it. In delivering the opinion in *Platt v. Johnson*, 15 Johns. 218, Thompson, C. J., refers to the case and says: "Though there was a difference of opinion on the bench as to the result of the motion in that case, yet this difference did not in any measure turn on the question presented by this case. Spencer, J., said the act of erecting a dam by the defendant was a lawful act; and though in its consequences slightly injurious to the plaintiffs, they were remediless; it was *damnum absque injuria*. The erection of dams on all rivers is injurious, in some degree, to those who have mills on the same streams below, in withholding the water; yet this has never been supposed to afford a ground of action. Livingston, J., said each one had an equal right to build his mill, and the enjoyment of it ought not to be restrained because of some trifling inconvenience to the other; and he utterly rejected the doctrine that the person erecting the first mill thereby acquired any superior rights." So in this case of *Platt v. Johnson*, it was decided that a person erecting a mill and dam upon a stream of water does not by the mere private occupation, unaccompanied with such a length of time as that a grant may be presumed, gain an exclusive right, and cannot maintain an action against a person erecting a mill and dam above his, by which the water is in part diverted and he in some degree injured.

So, in *People v. Platt*, 17 Johns. 211; *Crooker v. Bragg*, 10 Wend. 264; *People v. Canal Appraisers*, 13 Id. 355, it is cited and approved. The latest exposition of a New York court is in *People v. Canal Appraisers*, 33 N. Y. 472. Davies, J., giving the decision of the court, examines it thus: *Palmer v. Mulligan* was an action on the case for damages, which the plaintiff claimed to have sustained to their mill-dam by the erection, by the defendants, of another mill above theirs, and thus diverting the water. At the *locus in quo* there was neither flux nor reflux of the tide, and Emott, the counsel for the plaintiffs, contended that it had been decided in the case of *The Fishery of the Banne* that there are two kinds of rivers, navigable and

not navigable, the former extending as high as the sea ebbs and flows, and belonging to the king, and the latter being such where the sea does not ebb or flow, and belonging to the landholders on each side, and he contended that consequently the river changed its character at the point where the tide ceased to ebb and flow, and although in fact it was navigable above that point, it ceased to be a navigable river in the sense which made it belong to the king. Spencer, J., said: 'Has not the legislature granted islands above the site of these mills, and by that shown that they consider the Hudson to be a public river?' The counsel for defendants contended that the Hudson, at the point in controversy, was a public river, it seeming to be conceded on both sides if it was, then the bed thereof belonged to the state. A verdict was had for the defendants, and the supreme court refused to set it aside. In the opinion of the majority of the court, but a single allusion is made to the question now under discussion, and that was by Spencer, J., who said: 'It is conceded that the plaintiffs and defendants, respectively, own the lands on the bank of the river opposite their mills and dams. Whether the Hudson river be considered a public highway, or the bed of it as belonging to the owners of the adjacent shores, would not vary the result.' Thompson, J., who dissented from the judgment, was of opinion that as the tide did not ebb and flow as high up the Hudson river as the point in question, the land under the water was as much the subject of a private grant as the land adjoining the river subject to be used for public purposes. Chief Justice Kent also dissented, and held that the Hudson, at the point in question, was a fresh river, not navigable in the common law sense of the term, for the tide does not ebb and flow at that place." The case is cited by Story, J., in *Tyler v. Wilkinson*, 4 Mason, 402, to show that a person living on the bank of a stream may enjoy a fair and moderate use of the water, notwithstanding another may be disturbed thereby who had a prior use. It is cited in *Bowman v. Wathen*, 2 McLean, 382, to the point that there may be a private property subject to an easement by the public; and in an elaborate opinion by Woodbury, J., in *United States v. New Bedford Bridge*, 1 Wood. & M. 413, it is cited to show that an obstruction may be punished as a nuisance. In Washburne on Easements the case is noticed twice, particular reference being made to the opinion of Thompson, J., as laying down correct principles regarding the appropriation of water to private use.

BERGEN v. BENNETT.

[COURT OF ERRORS. 1 CAHNS' CASES, 1.]

POWER OF SALE IN MORTGAGE SURVIVES.—A power of sale contained in a mortgage deed, on default of payment, is a power coupled with an interest, and is not revoked by the death of the mortgagor.

PURCHASE BY MORTGAGEE.—A sale under such a power is a species of foreclosure, and the mortgagee may himself make a *bona fide* purchase of the property.

REDEMPTION, WHEN NOT ALLOWED.—After a lapse of sixteen years from the time of such sale, known to the mortgagor or his heir, and who all this time remained passive, a redemption will not be allowed.

APPEAL from the chancellor's decree, permitting a redemption of mortgaged premises by the respondent, Bennett.

The facts appeared as follows: On the twelfth of April, 1776, Wilhelmus Bennett, deceased, executed to one Vanderbilt, a bond for six hundred pounds, payable in one year, with interest at five per cent., and gave a mortgage on sixty-seven acres of land as security.

The mortgagor died intestate on the eighth of November, 1776, leaving the respondent, then a minor of fifteen years, his eldest son and heir. The usual power to sell was contained in the mortgage, which, together with the power, was, on the tenth of April, 1777, registered in the proper county in the book of mortgages. In the registry, as usual, the mortgage was abbreviated; but the power was, though not recorded as deeds usually are, set out at length, excepting the latter part, declaring the sale to be a perpetual bar, etc., which was altogether omitted. On the thirteenth April, 1781, the appellant, Tennis Bergen, purchased the bond and mortgage for seven hundred pounds. In 1783 the respondent left the state and went to Nova Scotia. On the eleventh of March, 1784, the appellant began the publication of a notice of sale under the power in the mortgage, but the notice did not give the boundaries of the mortgaged premises. The publication began on the eleventh of March, 1784, in a weekly paper, and after the first week was regularly continued in the supplement, the usual mode in such cases. From a file of the paper, the publication appeared to be duly made, except as to the last three days, for which period the papers were missing. A copy of the publication notice was for six months previous to the sale affixed to the court-house door in the county where the lands were situated, and remained until after the sale, on the eleventh of September following.

At the sale, one Bennett, a schoolmaster in the neighborhood, acted as auctioneer, on the request of the appellant. The conditions published at the time of sale were as follows: "Brooklyn township. Articles of the vendue for the sale of the land and meadow land belonging to the estate of Wilhelmus Bennett, deceased, containing sixty acres, more or less, held this eleventh day of September, 1784, by Tennis Bergen. Art. 1. That the highest bidder is to have the lot or parcel of land when struck off to him. 2. That the Indian corn and all the planting produce thereon is to be excepted. 3. That a drain of ten feet wide for the collect be excepted. 4. That one hun-

dred rails of the cross-fence of the corn be excepted. 5. That the money bid for the land is to be paid at the execution and delivery of the writings. 6. That in case the person or persons, to whom it is struck off, as aforesaid, cannot produce or procure a sufficient security, then and in such case the same lot or parcel of land shall be put up again; and if the same is then sold for less, the first buyer shall make up the deficiency; if sold for more, the first buyer shall have no benefit by the sale."

At the time of sale, there were only present the auctioneer, the appellants, one Cowenhoven, and a tenant. There was but a single bid, made by the appellant, Michael Bergen, for seven hundred pounds; and after having waited two hours, to see if a better offer would be made, it was struck off to him. He had attended on behalf of the other appellant, Tennis, and after receiving a conveyance, reconveyed to Tennis.

It appeared the premises were not worth more than the principal and interest due; and one Cowenhoven, a creditor of the mortgagor, to whom the land was offered, declared he would not give the amount of the bid. In 1788, the respondent returned, and on the third of February, 1800, filed his bill. The respondent, in support of the decree, maintained that the sale could not bar the redemption, it being null and void on the following grounds: 1. Because the power to sell, contained in the mortgage, "was not recorded as deeds usually are," before the execution of the conveyance to the purchaser; 2. Because the notice of the sale was uncertain, and that the directions of the statute were not complied with in the publication of it; 3. Because the conduct of the appellant, Tennis Bergen, touching the sale, and the proceedings preparatory thereto, were actually fraudulent; 4. Because the power to sell, contained in the mortgage, expired with the life of the donor; 5. That the mortgagee was a trustee for the mortgagor, and, as such, could not be a purchaser of the property which he himself sold in that capacity.

The chancellor held that the power in the mortgage was revocable at the death of the mortgagor, and denied that the power was to be taken as running with the estate. On the first point he uses this language in his opinion: "I have not been able to discover that the doctrine contended for, that the power is to have equal duration with the estate, has been recognized in any instance of this kind * * * * * By giving these powers a duration beyond the life of the mortgagor, they may in many instances disinherit his heirs; for here the parol cannot be per-

mitted to demur; here is no saving of the rights of an infant till his full age. The sale, if admissible at all, must be absolutely conclusive." And in reference to the power being co-extensive with the estate, he says: "As to the second position, that this power is to be taken as a covenant running with the mortgaged premises, there are no words of covenants. It imports to be a new grant of a power; it is a device intended to foreclose the mortgagor, without the intervention of judicial examination; and if a covenant, it must become a subject of such examination before it can have complete effect."

In the court of errors the case was argued by:

Bogert, Troup and Benson, for the appellants.

Hamilton and Tompkins, for the respondent.

For the appellants, it was contended that the respondent having remained silent so long, that he ought not now to be permitted to redeem: *Lockwood v. Ewer*, 2 Atk. 303. There was no defect in the publication notice, nor in the registry of the power of sale. And the imputation of fraud is rebutted by the fact that the land at the time of sale was not worth more than was due, and the refusal of Cowenhoven to take it at seven hundred pounds, the amount bid. The power could not die with the donor, being a power coupled with an interest: *Walsh v. Whitcomb*, 2 Esp. 565; *Hearle v. Greenbank*, 3 Atk. 714; S. C. 1 Ves. 306; *Eyre v. Countess of Shaftsbury*, 2 P. Wms. 120. This power is a part of the original contract, and of the security itself; and therefore it is irrevocable. Whether the purchase by the mortgagee will be valid or not, depends on circumstances: *Campbell v. Walker*, 5 Ves. Jr. 678. That a trustee cannot purchase, does not apply where he stands in the relation of *cestui que trust*. To impeach a purchase of this kind, fraud or some profit must be shown. Here the full value was given. And if a mortgagee has no right to make a fair and *bona fide* purchase, his security would often be inadequate.

For the respondents, it was urged that the statutory provisions were not pursued in the sale; and that the power was not duly recorded, and therefore the sale was void. The right of redemption should not be barred until after twenty years. The notice of sale was defective, inasmuch as the boundaries were not stated, and the quantity was incorrectly stated. These and the reservations of corn, etc., tended to lessen the value of the estate, and are facts indicating fraud. It was unlawful for the mortgagee, being a trustee, to purchase the land: 2 Eq.

Cas. Ab. 741; *Holt v. Holt*, 1 Cha. Cas. 190; *Whaley v. Whaley*, 1 Vern. 484; *Whitacre v. Whitacre*, Cas. Temp. King, 15, 61; *Whelpdale v. Cookson*, 1 Ves. 9; *Crowe v. Dallard*, 1 Ves. Jr. 215; *Campbell v. Walker*, 5 Id. 678.

By Court, KENT, J. This case comes before the court on an appeal from a decree of the court of chancery, that the respondent be permitted to redeem. The reason assigned for the decree was that the power to sell expired with the life of the mortgagor. This doctrine, if sound, renders it unnecessary to discuss any of the other points. If the power was extinct, the sale was null, and the right of the respondent to redeem exists in full force. It is proper, therefore, to turn our first attention to this point; and although my examination of it has led me to a different conclusion, I have made it with the deference and respect due to the court which pronounced the decree. It is admitted that a naked authority expires with the life of the person who gave it; but a power coupled with an interest is not revoked by the death of the grantor. In my opinion the power contained in the mortgage is of the latter description. A power simply collateral and without interest, or a naked power, is when, to a mere stranger, authority is given to disposing of an interest in which he had not before, nor hath by the interest creating the power any estate whatsoever. But when power is given to a person who derives, under the instrument creating the power, or otherwise, a present or future interest in the land, it is then a power relating to the land. These last powers are subdivided into powers annexed to the estate, and powers in gross. Both are considered as powers with an interest, because the trustee of the power has an interest in the estate, as well as in the exercise of the power. If, as one of the old cases expresses it, the person clothed with the power hath at the same time an estate in the land, the power is not collateral, because it savors of the land. The power now in question answers exactly to this definition of a power with an interest, because the mortgagee has at the same time a vested estate in the land, and it does not answer at all to the definition of a power simply collateral; for that is but a bare authority to a stranger, who has not, or ever had, any estate whatsoever. I might, perhaps, rest satisfied with giving this description of the two powers, drawn from approved authority; but I think the point is susceptible of more precise and definite illustration. If a man by his will directs his executors to sell his land, this is but a bare authority without interest; for the land in the meantime descends to the heir at

law, who, until the sale, would at common law be entitled to the profits; and, being but a naked authority, if one executor dies, the power at common law would not survive: Co. Litt. 113 a, 181 b, 236 a; 3 Salk. 277; Powell on Dev. 291-310.

But if a man devises his land to his executors, to be sold, then there is a power coupled with an interest, for the executors in the meantime take possession of the land and of the profits. In this case, the estate, so also the trust, would survive to the surviving executor. There is a very striking analogy between this case of a devise of land to executors to be sold, and a mortgage of lands with power to sell. In both cases the estate passes to the person clothed with the power, and in both cases the power is given in trust to answer a specific purpose. I cannot discern any distinction between the cases sufficient to render the power in the one instance naked, and in the other coupled with an interest. It is not a power with interest in the executors, because they may derive a personal benefit from the devise; for a trust will survive, though no ways beneficial to the trustee. It is the possession of the legal estate, or a right in the subject, over which the power is to be exercised, that makes the interest in question; and where an executor, guardian or other trustee is invested with the rents and profits of land for the sale or use of another, it is still an authority coupled with an interest, and survives. It has been thus frequently adjudged. This case also is still more analogous to the one of a conveyance of property by way of pledge, or in trust with an agreement for the mortgage to sell in case of default. This is a practice known in the English law, and it was taken for granted by the lord chancellor in the case of *Tucker v. Wilson*, 1 P. Wms. 261, that where there existed such an agreement, the mortgagee might sell after the death of the mortgagor. It seems to have been admitted, not to have been competent for the mortgagor to revoke this authority to sell, because it was granted for the benefit of the mortgagee. He might perhaps embarrass the execution of the power by a subsequent mortgage or judgment, but the power would still remain in full force, although the land in the hands of the purchaser under the power might become subject to such subsequent lien. In short, this power is altogether different from that of a mere naked authority; the latter is no better than a letter of attorney given to a stranger to the estate, as in the instance given by Coke of a letter of attorney to make livery of seisin: 1 Inst. 52b. This is revocable by the grantor at his pleasure in his

life-time, and is absolutely revoked by his death. The grantee of such a naked power, having no interest connected with the power, has, of course, no interest affected by the revocation. The present power is in every view distinct from the other. I conclude, therefore, that the power to sell was not revoked by the death of the mortgagor, and that the decree cannot be supported on the ground that was taken in the court below. I have bestowed some pains upon this question, because I am of opinion that the grounds of a definitive decree in chancery, resting upon what is assumed to be a principle of law, ought not to be questioned and overturned without much care and consideration. It remains to see whether any of the other points that were raised by the counsel upon the argument will bear out the decree. It is contended that the power was not recorded according to law. The act directs that all powers to mortgagees, for making sales in fee, shall be acknowledged, proved and recorded as other deeds usually are, before the conveyances for the sale be executed: Laws of N. Y. 1789, Appendix, 10.

I incline to think the act was complied with. The power was registered in the book of mortgages. The subject-matter of the whole act is mortgages; and in the preceding part of it it speaks of deeds with a defeasance in a separate writing, and of conditional deeds, and declares them to be the same as mortgages. It is no violent construction, therefore, to consider the words recorded as deeds usually are, to refer to mortgage deeds, they being the only deeds within the purview and other provisions of the act. These powers also are usually contained in the same deed with the mortgage, and to register the mortgage part of the deed in one book and the power part in another book would be inconvenient and idle. Admitting the proper book to have been selected, the power was well recorded; for it was recorded at length as far as the mere power in question went, and nothing was omitted but the covenant at the foot of it declaring the sale to be a perpetual bar. But if this be not the true construction of the act, I am satisfied that even the omission to record the power will not affect the sale. The only use in recording it is for the benefit of the purchaser, and it does not lie with the mortgagor to object to the validity of the sale by reason of that omission. He can have no concern or interest to be affected whether it be recorded or not. The next objection is that the notice of the sale was not according to the directions of the act. It is alleged that the proof of the six

months' notice in the newspaper and on the court-house door is not, as it ought to be, full and perfect; and some nice criticisms have been made upon its deficiency. I shall forbear entering into this examination. Considering the lapse of time since the publication was made, the proof of the notice is pretty well made out, and every defect may well be supplied by a reasonable presumption. I have, however, a short decisive answer to the whole objection; and that is, that after a mortgagor or his heir has lain by for sixteen years, he shall not then be permitted to come in and question the regularity of the notice. Public convenience essentially requires that we should establish this principle. It would be too rigid and severe to exact all these minutiae of proofs after such a length of time. It was next urged that the exceptions made and published in the conditions of sale rendered the same void. The exceptions which have been deemed as of serious moment (for I pass by the exception of the corn on the ground, and the one hundred rails, as not requiring an answer), are a drain for the collect of ten feet wide, and certain terms imposed on the purchaser, who could not give sufficient security. I am not inclined to question the doctrine that a mortgagee is bound to pursue his power strictly, and that although he may sell part of the land at one time and part at another, yet that he cannot clog and incumber the part that he sells, but must sell simply and unconditionally the whole interest as the same was conveyed by the mortgagor: *Co. Litt.* 113a; *Digges' Case*, 1 Co. 173 b.

I cannot, however, intend that this principle was violated in the present case. The exception of the ten feet may, or may not, have been an incumbrance to the premises. It could not have been made or intended as a benefit to the mortgagee, who became the purchaser; for the premises, it appears, were not bound upon him. He could have had no motive. For the drain being excepted from the sale, would, if created then for the first time, have remained in the heir of the mortgagor, and it must still remain his property. I think, however, we ought to intend, after this distance of time at least, that this drain had antecedently existed, and was founded on usage, or was an exception in the previous deeds of the land. It is more probable, then, that exception was put in for greater caution, and that the mortgagee himself had taken the premises subject to that exception. It would be unreasonable and impolitic, in my opinion, to disturb that sale at this day, by reason of a circumstance of such small moment, as a matter of fact, in which no

fraud or gain can be imputed to the one party, or real injury to the other; and when, by fair intendment, the whole can be so easily reconciled with strict principle on the subject. The other objection is that, by the conditions of sale, unreasonable terms were imposed on the purchasers who could not give sufficient security. These sales at auction may be insisted on to be cash sales. The mortgagee may have his conveyance ready to execute, and may exact the money as soon as the land is struck off. If he is willing, however, to allow a credit to the purchaser, and if he be entitled to allow it, he may then, no doubt, dictate the terms and extent of the security, so as the same be not unreasonable. If the purchaser is not satisfied with these terms, he has only to advance the money which the mortgagee is entitled to demand, and, if offered, bound to receive. But whether the mortgagee be entitled to sell upon credit and security, or is in all cases bound to exact the money immediately, it is unnecessary to decide; because the sale in question was not a sale upon credit, but a sale equivalent to a cash sale, since it was in reality a sale to the mortgagee himself. If he could not have sold upon security, but for cash only, these terms that were given out were null and void, and could have had no effect upon the sale or upon the purchasers; and if he was entitled to sell on credit and security, I should not consider the terms imposed to have been so unreasonable as that the sale ought now to be set aside, from that circumstance alone. I do not, therefore, consider these conditions of sale as forming any solid ground for the present bill to set aside the sale and redeem. Another objection to the sale is that the mortgagee was himself the purchaser; and it is a sound and established rule of equitable policy that a trustee cannot himself be a purchaser of the trust estate, without leave from chancery, and the reason of the rule is to bar the more effectually every avenue to fraud. This rule was recognized by this court in the cause of *Munroe et al. v. Allaire* (post, 330), but a distinction was there taken between the case of a suit against a trustee to set aside a purchase, he having purchased the formal legal title, as in the present case, and where a suit was by him commenced to complete the purchase, as in the case cited, and it was observed that in the former case, and the observation is consequently applicable to the present case, that equity would not interfere as, of course, to set aside the purchase; for although equity will not aid, it is not bound in every case to disturb such a purchaser. It has also been made a question whether the rule would apply to the case of a

trustee who was himself a *cestui que trust*, and was obliged to purchase in order to avoid a loss to himself by a sale at a less price.

But I shall forbear for the present from giving my opinion whether these distinctions are well taken or not, because the rule being admitted to be absolute and universal, it is still agreed that the *cestui que trust* must come in a reasonable time to set aside the sale, or he will not be heard: 5 Vez. Jun. 680, 681, 682. What shall be termed a reasonable time is not susceptible of a definite rule, but must, in a degree, depend upon the circumstances of the particular case, and be guided by sound discretion in the court. In this case the *cestui que trust* comes after sixteen years finding it a gaining bargain, and being all that time under no legal disability. Is this coming within reasonable time to set aside a sale on the ground of this technical rule of equity? Suppose the mortgagee, instead of selling the lands, had entered into possession of them under the mortgage, and enjoyed them as his own, twenty years' possession in such a case would have been a bar to a bill to redeem. This is a settled rule in chancery: 3 P. Wms. 287; 3 Bro. 641. And ought not sixteen years' possession, after a sale according to the directions of a statute, and which is a species of foreclosure by law, to be esteemed equal to twenty years' possession, commencing without such solemnity? In the case of *Wichalse, Exr., v. Short*, 1 Bro. Par. Ca. 414; S. C. 2 Eq. Ca. Ab. 177, the party came into chancery to redeem, eleven years after a foreclosure, and that, too, on the ground of a parol declaration of the mortgage, that he was willing to receive back his money; but the court of chancery held (and the decree was affirmed in the house of lords), that the mortgagor came too late after a lapse of eleven years, and that it would be a bad precedent to open the foreclosure, as it would render the property acquired under such circumstances extremely precarious, and would be attended with mischievous consequences to the mortgagee, who, in the meantime relying on his title, had improved the estate and kept no account of the rents and profits. Such a practice would shake an abundance of titles. In the case likewise of *Lunts v. A. and W. Crispe*, 2 Bro. Par. Ca. 111, a rule to redeem was refused, after the mortgagor's acquiescence for six years, under a foreclosure by his own consent. These cases are certainly not stronger than the present, and I think the acquiescence of the *cestui que trust* in the purchase by the mortgagee, and which is necessarily presumed from his delay, ought now

to conclude him. The allowing him to redeem would establish a precedent much more impolitic and inconvenient in its consequences than the violation in this case of the rule, that a mortgagee shall not purchase. I conclude, therefore, under the circumstances of this case, none of the objections raised are sufficient to justify the setting aside the sale of 1784, and, consequently, that the decree of the court of chancery ought to be reversed, and that the bill below to redeem be dismissed with costs

This is regarded as a leading case on the subject of powers. It has been extensively cited and indorsed as an authority, both in New York and elsewhere. In *Olcott v. Tioga R. R. Co.*, 27 N. Y. 566, it was cited as to a power of sale in a mortgage. It is also cited and approved in *Franklin v. Osgood*, 14 Johns. 553; *Jackson v. Davenport*, 18 Id. 300; *Canfield v. Monger*, 12 Id. 347; *Bradstreet v. Clark*, 12 Wend. 664; *People v. Tioga*, 19 Id. 74; *Taylor v. Morris*, 1 N. Y. 358; *Lawrence v. Farmers', etc. Co.*, 13 Id. 213; *Gardner v. Ogden*, 22 Id. 348. It has also been repeatedly noticed in the federal courts. Thus, in *Dartmouth College v. Woodward*, 4 Wheat. 700, it is cited on the point of a power being irrevocable if coupled with an interest. So in *Hunt v. Rousmaniere*, 2 Mason, 249, Story, J., referring to it, says: "The case of *Bergen v. Bennett*, cited at the bar, is certainly good law, and it will illustrate the distinction between naked powers and powers coupled with an interest." It is cited as showing when a power survives in *Peter v. Beverly*, 10 Peters, 564; *Taylor v. Benham*, 5 How. 269. In *Lockett v. Hill*, 1 Woods, 560, Erskine, J., says of it, that on this subject it is the first reported case in this country.

In *Watson v. Mulford*, 1 Zab. 507, Carpenter, J., referring to this case, says: "There is a case in which on sale of mortgaged premises under a power, after acquiescence for sixteen years, it was held that it might be presumed that the notices of sale had been regularly posted and published. The case may be questioned to the extent to which the principle was announced as a conclusion of law, though probably rightly applied to the circumstances of the case." The latest citation of the case is found in *Ten Eyck v. Craig*, 62 N. Y. 419, on the subject of a trustee dealing with the trust property, and the language of Kent, J., as to the reason of the rule, approved.

LUDLOW v. SIMOND.

[2 GAYNES' CASES, 1.]

DISCHARGE OF SURETY.—Where a surety bound himself to make good a deficiency arising from a sale of goods consigned to the correspondent of the creditor who had entire control of the consignment, a sale by the consignee at another place than that agreed on releases the surety.

JURISDICTION OF EQUITY IN MATTERS OF ACCOUNT.—Although there may be a remedy at law in matters of account, yet, if the relief be doubtful or inadequate, equity will entertain the bill, in order the more effectually to give relief generally.

EXECUTION OF SEALED INSTRUMENT BY SEVERAL.—Where several parties should unite in the execution of a sealed instrument, they may use and adopt the same seal.

APPEAL from a decision of the chancellor, dismissing the appellants' bill with costs. On the eleventh of March, 1799, the appellants entered into an agreement with one Leremboure, and the respondent, Simond, by which Leremboure was to load on board one or more vessels a certain quantity of tobacco and Havana sugars, the former at ten and a half and eleven cents per pound, the latter at fifteen dollars and seventy-five cents for brown sugar, per hundred, and nineteen dollars for white, the cost of the whole to reach about forty thousand dollars, deducting the drawback. The goods were to be consigned by Ludlow & Co. to Buildemaker & Co., the correspondents of the former at Hamburg, to be sold for the account of Leremboure. Ludlow & Co. were to furnish Leremboure their notes to order for the amount of forty thousand dollars, payable one-half at four, and the other half at six months, each half to be divided into several parts, and to be delivered corresponding with each particular shipment. The amount of the goods was to be fully insured. It was agreed Ludlow & Co. should be allowed a commission of two and a half per cent. on the invoices of the goods shipped. To secure to them the payment of the forty thousand dollars, as well as this commission, Leremboure was to assign the policies to Ludlow & Co., but in case of no payment from this source, Ludlow & Co. were authorized to draw at sixty days sight on London, twenty days before their notes respectively became due, and to order the necessary remittances to be made by Buildemaker & Co. to their correspondents in London to meet their drafts; the remittances to be at the risk of Leremboure, both as to the validity of the bills and the solvency of the house in London, to whom the same might be made. Ludlow & Co. were to be allowed a further commission of one and one-quarter per cent. on the amount of bills they might draw. If the proceeds of the sales at Hamburg should not prove sufficient to reimburse Ludlow & Co., the amount of the several notes, interest, commission and charges, Leremboure should make good the deficiency as soon as ascertained, by giving his note to Ludlow & Co. at sixty days, indorsed by Simond & Co., who consented thereto; and Ludlow & Co. agreed, if the proceeds exceeded the amount due them, to pay the difference in cash. The several parties, Ludlow & Co., Leremboure, and Simond & Co., executed the agree-

ment, binding themselves to each other in the sum of one hundred thousand dollars for its due performance. In pursuance of this agreement, Ludlow & Co. furnished notes to the amount of twenty thousand dollars to Leremboure, who at the same time assigned to Ludlow & Co. the policies for forty thousand dollars, on the cargoes of two ships loaded with sugar and tobacco, marked D. L., and consigned by Ludlow & Co., and ordered to be sold according to the terms of the agreement. On the sixth of April following, Ludlow & Co. gave Leremboure other notes, making a total of thirty-six thousand four hundred and thirty-one dollars and eighty-eight cents. The cargoes arrived safely at Hamburg, but owing to the bad condition of the market, were sent by Buildemaker & Co., without directions from the appellants, to Rotterdam, and there sold for about fourteen thousand one hundred and twenty-six dollars and eighty-five cents, net, which was paid over to Ludlow & Co. In October, 1800, Ludlow & Co., having ascertained the balance due, presented the account to Leremboure and demanded payment; the latter acknowledged the correctness of the account, but refused to give his note for the amount, he being insolvent. Ludlow & Co., sixty-three days after, called on the respondent for the amount, who also refused to pay.

Upon these facts, the chancellor dismissed the bill with costs; whereupon an appeal was taken to this court.

Woodworth, attorney-general, Pendleton and Harison, for the appellant.

Hoffman, Henry, Van Vechten and Edwards, for the respondent.

SPENCER, J. In the discussion of this cause the counsel have rested their arguments on two principal points:

1. Whether the court of chancery had jurisdiction of the cause;

2. Whether the respondent, Simond, has, from the facts proved, been discharged from his responsibility on the contract entered into between the appellants, Leremboure and himself.

I shall not enter into a particular consideration of the first question, because it is immaterial, in the view I have taken of the subject, whether the court of chancery had or had not jurisdiction. I wish, however, to be explicitly understood as not subscribing to the proposition that that court had cognizance of the cause on any of the grounds urged by the appellant's counsel; and did it rest solely on that point, the strong inclination of my opinion is, that the appellants' relief, if any they are entitled to, is at law.

It cannot be controverted but that Simond is a surety or guarantor for the performance of Leremboure's contract, so far forth as respects the indorsement of a note which the latter stipulated to give Daniel Ludlow & Co., for the deficiency of the proceeds of the sales of the goods mentioned in the contract. He is surety merely, without the chance of reaping any benefit from the enterprise; he has no interest in the adventure, and does not appear to have been indemnified by any security for this gratuitous undertaking, and, although it was suggested, yet no facts appear in the case to warrant those suggestions, and the court are to judge *secundum allegata et pro bata*. I proceed, therefore, on the fact that Simond was a surety, without any interest in the subject-matter of the contract, and without any counter security. It has been correctly urged that sureties are favorites of courts of equity, and that those courts will not bind them, where they are not strictly bound at law. It may, in the same sense be said, that they are favorites of courts of law; and that there they will not be bound beyond the scope of their engagements. These maxims, if I may so call them, grow out of the consideration, that in the various transactions in life men are liable to be called on to render acts of neighborly kindness, without any interest or expectation of reward; that they are frequently called on to become bail, indorsers of notes, guaranties in various modes, and when, in such cases, the principal turns out to be insolvent, it becomes a question which of two innocent parties shall sustain a loss. Both courts of equity and law will cast the responsibility on the surety, if by the terms of the engagement he has assumed it; but neither of them will do this where he is not brought within the precise scope of his undertaking. The authorities on this subject are very uniform; they speak a language not to be misunderstood, and, without detaining the court by an enumeration of them, I am fully justified, by those cited, in saying that, both in law and equity, contracts, involving the rights of sureties, will so far as respects them receive a more rigid and less liberal construction than between the original contracting parties.

(After reviewing the material facts in the cause, as before stated the judge proceeded). From this state of facts arises the question, whether the respondent is to be holden responsible for the deficiency of the sales; and, in my opinion, he is not responsible. The contract he has entered into obliges him to indorse Leremboure's note for the deficiency of the proceeds of the sales at Hamburg. The place of the sale is, in my concep-

tion, not only a condition precedent, but it enters into the substance of the contract. It may not appear, at first view, at all material where the sales were made, provided the goods were sold for the best price that could be obtained; but it will, on examination, appear extremely important to the respondent that the sales should have been made at Hamburg, rather than Rotterdam. Whether, however, this be or be not material, if Hamburg was agreed by the contract to be the place of sale, then on principles, as applicable to sureties, the respondent is discharged. That Hamburg was the designated place of sale is manifest not only from the words of the contract, but from its plain and evident meaning. The goods were consigned to Buildemaker & Co. to be sold; the consignment to this house, transacting business at Hamburg, a great commercial city, imports, in itself, that the sales were to be there. The insurances, extending no further than to Hamburg, is still more demonstrative of the sense and understanding of the parties, that they were to go no further. The want of provision in the contract for any other market, and above all, the express terms of the contract, whereby the respondent engaged to indorse Leremboure's note for the deficiency of the proceeds of the sales at Hamburg, leave, I think, not a particle of doubt on that subject.

The case is then perfectly analogous to the case in 2 Chan. Ca. 22, where a bond was given by a principal and his surety to pay such sum as N. H., a master in chancery should report. The master agreed on died without making a report. The chancellor determined, on the principle I have stated, that the surety, not being bound at law, should not be holden in equity.

The sales not having been made at Hamburg is, I think, matter of substance. I have observed already that the appellants gave their notes on the eleventh of March and sixth of April, 1799. The first became payable the fourteenth of July, and the last the ninth of October, in the same year. The appellants contemplated, beyond a doubt, to meet these notes by drafts on London, at sixty days' sight, and for that purpose Leremboure authorized them to draw bills, twenty days before their notes respectively became due, and to order the necessary remittances to be made by Buildemaker & Co. to their friends in London, on whom they might value to meet their drafts. From this arrangement the respondent must have contemplated, when he entered into the contract, that the cargoes thus shipped were to be sold, so as to form a fund for the payment of the bills to be drawn by the appellants, and that the term of his

responsibility would not be extended beyond the last of the year 1799. Instead of this, by the transportation of the goods to Rotterdam, the period of his responsibility was enlarged to the thirtieth of September, 1800, a time far beyond any ideas he could have formed from the provisions of the contract. Had it not been thus enlarged, and the goods been sold for the lowest possible price at Hamburg, he might, for aught that appears, have secured himself before Leremboure became insolvent. As in the case of *Rees v. Berrington*, 2 Ves. Jr. 543, so here, in the language of Lord Loughborough, "we cannot try the case by inquiring what mischief it may have done (to send the goods to Rotterdam), for that would go into a variety of speculation, upon which no sound principle could be built." To hold the respondent liable, notwithstanding the terms have not been complied with, on which alone his responsibility was to arise, would be substituting another contract in lieu of the one the parties have made. It is impossible to say that a contract agreeing to be responsible for the deficiency of the proceeds of sales at Hamburg, ought to be construed to be responsible for the deficiency of the proceeds of sales at Rotterdam.

It has been urged, by the appellants' counsel, that Buil-maker & Co. were not exclusively their agents, and that they acted without their directions in sending the goods to Rotterdam, and that they had by law a right to send them to a neighboring market for a better price. It will not, I trust, be contended that, had the appellants ordered the goods to Rotterdam in case a higher price could have been there obtained, that then the respondent would have been liable. If, in that case, all responsibility would have been gone, how can it alter the case, as respects the respondent, by what means the goods were sent there? He had no control over them; and if his responsibility is extended beyond the terms of his contract, however hard the case may be as regards the appellants, it would be harder as respects him. If, by law, an agent receiving a consignment of goods to sell, may send them to another market, which I am not prepared to admit, then the appellants may be chargeable with negligence in not instructing Buil-maker & Co. to sell at Hamburg. But if, as I incline to think, they could not as consignees have sent their goods to another market, they would, under the facts proved in this case, be responsible to the appellants, unless they have affirmed their acts, and thus concluded themselves. "A man may," says Chief Justice Willes, in his Reports, p. 407, "in many cases

either consider another as a wrongdoer, or as a receiver of money for his use, as he thinks best, and most for his advantage." In this case the appellants have, it appears to me, affirmed the acts of Buildemaker & Co. in selling the goods at Rotterdam, by receiving their accounts, and passing the proceeds of the sales there to the credit of Leremboure. This fact appears by the accounts exhibited by the appellants. It then turns out to have been a sale at Rotterdam, contrary to the contract, assented to by matter *ex post facto* by the appellants, and this I consider another insuperable difficulty to their recovery.

The amount in demand, and the learned and ingenious arguments submitted to the court, have induced all the research and examination in my power to bestow. The clear and decided result is, that the respondent is discharged from his responsibility on the contract; and although I perceive that the appellants have conducted themselves with perfect good faith; that the loss is to them a severe misfortune, I am unwilling to restore them their losses by inflicting an injury on a man having a perfectly legal and meritorious defense. In my opinion, therefore, the decree of the chancellor must be affirmed with costs to be taxed.

THOMPSON, J. This case naturally divides itself into two general subjects of inquiry: 1. As it respects the remedy, whether, if any, it ought to be in a court of law, or in a court of equity; 2. As it respects the rights of the parties.

The first may be considered in some measure as matter of form; the second as matter of substance; and although it might be deemed more correct, in point of order, to determine the right before the remedy, yet, as I shall examine both questions, not knowing the course that may be pursued by other members of the court, the order of examination becomes immaterial.

There are several grounds, I think, upon which the appellants had a right to go into equity for relief. It is undoubtedly important to the ends of justice that the boundary between the jurisdiction of courts of law and courts of equity should be plainly marked and strictly pursued. Were, indeed, the present an attempt to overleap the boundaries heretofore established, it might present a different question; but that, I think, is not the case here. By the ancient rule, according to Lord Coke, 4 Inst. 84, the jurisdiction of the court of chancery was confined to frauds, accidents and trusts. So in 10 Mod. 1. But that jurisdiction has been gradually extended, and Fonblanque,

in the first volume, page 8, of his valuable treatise, observes that the English courts of law are, equally with their courts of equity, chargeable with having extended their jurisdiction by the aid of fiction, and that if courts of equity, professing to proceed upon the ground of the party being remediless at law, do take cognizance of some matters of which courts of law would now take cognizance, they will be found originally to have derived their jurisdiction from the narrow decisions of courts of law, and having once strictly possessed it, courts of law ought not to be at liberty at pleasure to deprive them of it. The jurisdiction, he again says, page 11, exercised by courts of equity, may be considered in some cases as assistant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law. Matters of account form one class of cases, wherein courts of law and equity exercise concurrent jurisdiction. Blackstone, 3 Com. 437, lays it down as extending to all matters of account; and it is a subject, I think, over which the jurisdiction of a court of equity ought to receive a liberal construction, because the mode of proceeding is more peculiarly adapted to a deliberate examination and correct settlement. All parties in the present case were interested in having the account stated. The result was the basis upon which the respective rights and responsibilities of the parties depended. The account being to be stated by the appellants themselves cannot alter the question. The other party had a right to contest it, and the same examination might be involved as if the defendants below had been called upon to account. In matters of account both parties are actors: 1 P. W. 363. Hence it is that after a decree to account a defendant may revive the suit; because, say the authorities, in such case the defendant is considered as an actor; for, until the account is taken, it is not known where the balance lies. Although the account, as stated, was admitted by Leremboure, it was not by Simond. The necessity of a discovery might originally have been the foundation of the jurisdiction of a court of chancery, in matters of account; still I cannot discover from authorities that it is now restricted to cases of that description. Mitford, 111, says that in matters of account equity has a concurrent jurisdiction with courts of law, in cases where no difficulty would have attended the proceeding in those courts: S. P. 1 Wms. 251, n. A. And I can see no good reason why a trustee who is desirous of having his accounts settled, should not be at liberty to call the *cestui que trust* into a court of equity for that purpose.

There is another ground, I think, for sustaining the bill. Leremboure had refused to give his note for the deficiency, and it may be doubtful whether a specific performance in this respect was not necessary for the purpose of charging Simond. If, also, any fraud or collusion had been practiced between them, it would, in a peculiar manner, be an object of chancery jurisdiction. The transaction was complex, the remedy at law difficult: 1 Str. 733. Mr. Justice Buller, when sitting for the Lord Chancellor, in the case of *Weymouth v. Boyer*, 1 Ves. Jr. 424, says: "We have the authority of Lord Hardwicke that if a case be doubtful or the remedy at law difficult, he would not pronounce against the jurisdiction of this court, and the same principle has been laid down by Lord Bathurst." Matters of account are proper subjects for a court of equity: 1 Atk. 128. It does not follow that because a court of law would give relief that a court of equity loses the concurrent jurisdiction, which it has in matters properly cognizable there: 3 Bro. Cha. Ca. 224. In *Wright v. Hunter*, 5 Ves. Jr. 794, the master of the rolls says: "I would not lay it down that because courts of law may entertain actions on such subjects" (a case of contribution among partners) "a party may not file a bill for contribution;" for though he thought the question more proper to be tried at law, the plaintiff was very well justified in coming there, "for," he adds, "this court has never given up its jurisdiction."

Independent, however, of the foregoing considerations, I am inclined to think the respondent comes too late with an objection to the jurisdiction of the court, he having answered and contested the merits, the subject of the bill being within the jurisdiction of the court. This appears to me to be a reasonable rule and calculated to save expenses. It is a good general principle that where a party objects to the jurisdiction of a court, he ought to do it at the earliest opportunity. I would not, however, be understood to extend this rule to cases where the subject-matter is not within the jurisdiction of the court. Baron Gilbert, in his *History and Practice of the Court of Chancery*, says, page 219: "Where the common law would give the same relief as a court of equity there, if the defendant would deny the deed and demur to the relief, the demurrer would be allowed; but if the defendant doth not demur to the relief, the court will decree for the plaintiff on the hearing, after the deed is properly proved; because the defendant admitted the jurisdiction by answering and putting it in issue, and not demurring." Again, page 51: "Where a plaintiff goes into a court of

equity for damages, which are uncertain, and not to be settled but by a jury, the defendant may demur to the relief after having first answered to the damages; because it is *alieni fori*, since the court cannot settle the damages." But this must be *ante litem contestationem*, for if he answers and contests with the plaintiff, he can take no advantage of it at the hearing; for he has submitted to the jurisdiction of the court, and the court will not try at law the *quantum* of damages by a feigned action: 1 Ves. 446. I am, therefore, of opinion that the objection to the jurisdiction of the court was not well founded. But as the result of my opinion is with the respondent, it is of little moment as it respects the present case, whether the appellants have resorted to the proper forum for redress or not.

The first question presented on this part of the case relates to the execution of the contract on the part of the appellants. It purports to have been executed in the name of Daniel Ludlow & Co., being the name of a firm composed of Daniel and Gulian Ludlow. The signature must necessarily have been written by one only of the company, and as it is a settled rule of law that one partner cannot bind his copartner by seal, it is contended that the contract is invalid. Had the execution been by one of the firm, without the assent of the other, the objection might be well grounded; but from the testimony the fact appears otherwise. Two witnesses testify that they saw Daniel Ludlow and Gulian Ludlow execute the contract. It is said, however, that this testimony is equivocal; that the witnesses intended probably to be understood that they executed it in the usual and ordinary mode, in the course of the partnership concerns, by one only of the company. This inference appears to me not warranted by the language of the witnesses. They speak of the parties individually, not as a company; and had not Daniel Ludlow and Gulian Ludlow both been present and assented to the execution, the language of the witnesses doubtless would have been, that they saw the contract executed by the one who subscribed the name of the company. The interrogatory part of the witnesses was: "Did you not see Daniel Ludlow and Gulian Ludlow execute the deed?" Taking it for granted, from the evidence, that Daniel and Gulian were both present and assented to the execution, and probably both acknowledged the seal. I think the contract well executed according to the principles settled in *Lord Lovelace's case*, Sir W. Jones, 268; and *Ball v. Dunsterirille*, 4 T. R. 314.

I shall next examine the character which the respondent,

Simond, assumes in this contract. This becomes necessary, because, from the whole current of authorities, it is manifest that where a party is charged as surety he has a right to avail himself of a strict and literal construction of his contract in order to exonerate himself from responsibility. In examining this question we have principally to resort to the contract itself. In expounding it the cardinal rule is, that the intention of the parties ought to be sought after and carried into effect, and to govern the construction, where, from the instrument itself, that intention can be discovered. In viewing the general nature and object of this contract, and the parties who were to be beneficially interested in the speculation, I can consider Simond in no other point of light than in the character of a mere surety. It is the essence of a partnership transaction that each partner should be entitled to the gain as well as exposed to the loss resulting from the concern. That was not the case here, for it is expressly provided that if the proceeds of the several shipments shall exceed the amount due Daniel Ludlow & Co. it shall be paid to Leremboure. Every feature of the contract shows that Simond was not concerned in interest. The shipments were to be made by Leremboure; the notes to purchase the cargoes were to be furnished to them; the sales were to be made on his account and at his risk; the policies of insurance were in his name and by him to be assigned; the loss, if any, at the winding up of the speculation to be borne by him; for the contract expressly states that "A. M. Leremboure agrees to make good the deficiency when ascertained." The mode of doing it, however, was by giving his note with Simond's indorsements. The appellants, in their bill, pray "that the accounts between them and the said Leremboure, arising under the said agreement, may be taken and stated." Not that the accounts between them and the said Leremboure and Simond might be taken and stated, which would have been the prayer had they conceived Simond beneficially concerned. In addition to this, Simond, in his answer under oath, solemnly denies having any interest in the contract, and this is not contradicted or in any manner rebutted by the appellants.

Simond then being considered a mere surety, it becomes necessary, in order to determine his liability, further to examine the contract, and see what was to be done by the parties respectively, for the purpose of determining how far each one has complied with his obligation imposed by the contract, and the law applicable to this case. There is no necessity, however, of

minutely examining all the stipulations contained in the agreement; no breach of them is alleged on either side. Leremboure, on his part, purchased and shipped the cargo pursuant to his contract; caused them to be insured, and duly assigned the policies to the Ludlows. The Ludlows, on their part, furnished Leremboure with the means of purchasing these cargoes, and consigned the bills of lading which were given to them, to Buildemaker & Co., their correspondents at Hamburg, according to the stipulations of the said agreement. But the principal controversy relates to the time and place of selling these shipments; and whether, in that respect, there has been any laches on the part of the appellants so as to take away their right of calling on the surety to make good the loss. Here I would premise, as it was made a topic of argument by the counsel, that I see no ground for alleging fraud or collusion, either against the complainants or the respondents. But the case presents an honest struggle to shift the burden of a very heavy loss.

There is no time expressly limited by the contract within which the shipments were to be disposed of; but from the other provisions in the agreement, I think the intention of the parties in that respect, may easily be discovered. It is fairly to be presumed, that the complainants did not intend to advance cash for the purchase of the cargoes, but only to lend their names and credit to Leremboure for that purpose. The first shipment was made on the eleventh of March, 1799. The notes furnished by the complainants of that date, payable in six months, according to the contract, would fall due the fourteenth of September, and those payable in four months would fall due the fourteenth of July. The second shipment was on the sixth of April, 1779. The notes furnished of that date, payable in four months, would fall due the ninth of August. The amount of the complainant's notes, furnished to Leremboure, was thirty-six thousand four hundred and thirty-one dollars and eighty-eight cents, which fell due in the proportion and at the times following, to wit: Two thousand six hundred and ninety-seven dollars and ninety-nine cents; on the fourteenth July; thirteen thousand seven hundred and thirty-three dollars and ninety-nine cents on the ninth of August; and twenty thousand dollars on the fourteenth of September. According to the usual course of a voyage between New York and Hamburg, calculating on a ready market, the proceeds of these shipments would have been received in season to answer the complainants' engagements.

This fortified by the appellants' own showing, in the account current annexed to their bill of complaint. From that it appears that they must, as early at least as the sixteenth of July, have received the certificate of the sugars having been landed at Hamburg, which was necessary to entitle them to the drawback. The sugar was shipped on the sixth of April; from that to the sixteenth of July is but little more than three months. The appellants' notes were payable at four and six months, making an allowance for unforeseen delay. Hence I think it reasonable to conclude that the appellants calculated to meet the payment of their notes with the proceeds of these shipments, and that Simond, the surety, probably made the same calculation. In case Daniel Ludlow & Co. should not be reimbursed by the policies of insurance, they were authorized to draw for that purpose at sixty days' sight on London, twenty days before their notes respectively became due. According to these data, the last draft might have been made on the twenty-fourth of August; the answer, to which making very liberal allowances, would probably have been received here as early as December, at which time Simond had a right to calculate that the speculation would have been wound up, and the result of his responsibility known.

The contract, I think, carries stronger internal evidence with respect to the place than with respect to the time of sale. There can be but little doubt but that the contemplated place of sale was at Hamburg. The appellants stipulate to make the consignment to their correspondents at Hamburg. That part of the contract providing for the deficiency declares that "should the proceeds of the sale at Hamburg not prove sufficient," etc. The vessel sailed for Hamburg, and the insurance was for the same place. The last is a strong circumstance, showing the understanding of the parties with respect to the place; because, the policies were to be assigned to the appellants as security, which would altogether have failed, had a loss happened after the vessel left Hamburg, on a voyage to another market.

Another question for examination is, the relation in which Buildemaker & Co. must be considered as standing to the respective parties. The object of the appellants manifestly was, to have the disposition of these shipments and the proceeds completely under their control and management. They themselves might be considered as trustees for Leremboure, with a lien upon the property for their advances and commissions. It

would not, however, have been in the power of Leremboure to have called the property out of their hands, or counteracted their orders until such lien had been discharged. There is nothing in the transaction showing that Buildemaker & Co. knew any other persons than the appellants were interested in the shipments. The bills of lading were in their names; the consignment made by them; they to order with respect to the remittances; and, in short, to have the uncontrolled direction for the purpose of reimbursing themselves. Under such circumstances, I can conceive Buildemaker & Co. in no other light than as the immediate agents of the appellants. It would be incongruous to consider them the agents of Leremboure, and still he to have had no control over them; and to have permitted him to have had any control, might have defeated the Ludlows' security in some measure. But admitting Buildemaker & Co. to have been the joint agents of the appellants and Leremboure, it cannot affect the rights of Simond. His liability could not be prolonged or increased without his assent.

In what respects then has there been a variance in the execution of this contract from what may reasonably be supposed to have been the understanding and intention of the parties? I think there has been a deviation both with respect to time and place. The final winding up of the speculation has been prolonged from some time in December, 1799, to September, 1800, and the sales of the tobacco were at Rotterdam instead of Hamburg. The appellants having the control over this property, in the characters of trustees for Leremboure, it was their duty to have made use of more diligence in the disposition of it; or if, from change of circumstances at Hamburg, any embarrassments were thrown in the way, Leremboure and his surety ought to have been apprised of it. The forbearance of a trustee in not doing what it was his office to have done, shall in no sort prejudice the *cestui que trust*, since at that rate it would be in the power of trustees, either by not doing or by delaying to do their duty, to affect the rights of other persons: *Lechmere v. Earl of Carlisle*, 3 P. Wms. 215. It is not reasonable to suppose the appellants were ignorant of the conduct of Buildemaker & Co. in sending the tobacco to Rotterdam. They had not been reimbursed for their advances; the proceeds of the tobacco, as well as the sugar, were to make the fund to which they were in the first instance to look for reimbursement. In addition to this, the account current annexed to the appellants' bill, shows, I think,

conclusively, that they must have been apprised of it. They continue drawing at different times on Buildemaker & Co. until the thirteenth of August, 1799. They then stop, and no further draft is made until September, 1800. Why this delay? They were not reimbursed; they must have known the fund first to be resorted to for that purpose was not exhausted, or they would have called on Leremboure and Simond for the deficiency. They wait, however, for one whole year, and then draw upon Buildemaker & Co. for the proceeds of the tobacco. By this, I think, they affirmed the conduct of Buildemaker & Co. in sending the tobacco to Rotterdam, if it was unauthorized in the first instance: Willes, 407. It is unnecessary here to say what ought to be the decision as between Ludlows and Buildemaker & Co., or between Ludlows and Leremboure. It appears to me, however, to be allowing agents a very considerable latitude of discretion to justify so material an alteration of the destination of a cargo as from Hamburg to Rotterdam, from a neutral to a belligerent port. Yet, where agents act in good faith, a very liberal construction ought to be given to their conduct. Very different rules prevail when the rights of sureties are involved; as against a surety the contract cannot be carried beyond the strict letter of it: 2 T. R. 370. A party cannot oblige a surety to remain such, contrary to his consent, longer than the time first bargained for: 2 Bro. Cha. Rep. 582, 583. Delay granted to the principal will discharge the surety: 2 Ves. Jun. 542. The engagement of Simond was definite, to wit: to indorse Leremboure's note for the deficiency of the proceeds of the shipments to reimburse Ludlows. This deficiency, however, to be ascertained in the manner and within the time prescribed by the contract. This Simond had a right to demand. In the case of *Wright v. Russell*, 3 Wils. 359, the court said: "A surety ought not to be bound beyond the scope of his engagement. That courts of equity are favorable to sureties; for where they are not strictly bound at law, a court of equity will not bind them." This doctrine was recognized and very much approved of by Lord Kenyon, in the case of *Myers v. Edge*, 7 T. R. 256. Where any act has been done by the obligee that may injure the surety, equity will discharge him from his liability: 4 Ves. Jun. 833. In the present case, the appellants, by prolonging the winding up of this contract, exposed the surety to greater hazards, among which the insolvency of Leremboure was no inconsiderable one, as the result has shown. The case of *Simpson v. Field*, 2 Cha. Ca. 22, is a strong one to

show the rigid construction adopted by courts to protect sureties, and also that equity will not bind them further than they would be bound at law. The case was shortly as follows; the defendant was bound as surety in a recognizance conditioned to pay what should be reported by N. H., a master named in the condition. The master died before the report was made, and by the strict letter of the condition the defendant was suable at law, because the report was not made by the master named, but by another. The lord chancellor dismissed the bill, saying the party is but a surety, and not bound at law. The same principle we find recognized in the cases of *Ratcliff v. James*, 1 Vern. 196, and *Sheffield v. Lord Castleton*, 2 Vern. 393, and numerous others that might be cited.

If the view which I have taken of the contract be correct, and the deduction be warranted by the case, the respondent stands protected by a host of authorities. However honest and upright the conduct of the appellants may have been, they are chargeable with such a deviation from the contract, and such a want of due diligence in winding up the speculation, as will, in judgment of law, exonerate the surety. I am, therefore, of opinion that the decree of the court of chancery ought to be affirmed.

KENT, C. J. In the discussion of this cause, two leading questions have been raised, both of which have been very elaborately and ably considered by counsel. The one question relates to the mode of seeking redress, and the other to the merits of the controversy. It is necessary that I should give each of them an examination, and this I shall do in the order in which they are stated.

The first question then is, whether the court below had jurisdiction of the cause. I incline to the opinion that the court had jurisdiction: 1. Because matters of account were involved; 2. Because the remedy at law was at least doubtful; 3. Because the defendant, instead of demurring to the bill, submitted to the jurisdiction by putting in an answer to the merits. The bill stated, at large, the contract between the appellants and Leremboure and Simond, and the history of the commercial adventure which arose out of that contract. It then stated that a considerable loss happened on the sales abroad, and that the accounts relative to the transaction were presented to Leremboure, who acknowledged them to be just, but refused to give his note, as stipulated by the agreement, and that both he and Simond refused to pay the appellants the balance due them on

the contract. The bill further stated that difficulties would attend their proceeding at law, and prayed the accounts respecting the transaction might be taken and stated, and the balance paid.

The accounts embraced the whole process of the adventure, from its commencement to its conclusion, and consequently consisted of a variety of charges and credits. As, then, one material part of the cause depended on a settlement of accounts, I think it came properly within the cognizance of the court. Chancery has a concurrent jurisdiction with the courts of law in all matters of account. Whether this jurisdiction originally arose from the necessity of obtaining a discovery by the oath of the defendant, or, in order to prevent a multiplicity of suits, is perhaps not now material to inquire, since it has become well established in cases where that necessity does not exist, and where no difficulty would attend the remedy at law: Mitf. Treatise, 109, 110, 111; 3 Bl. Com. 437. The cognizance of all causes that lie in account does undoubtedly give a very broad jurisdiction to the court of chancery, but the exercise of this jurisdiction has been found in practice so convenient and salutary, that it has long since, by general consent, rendered obsolete the common law remedy by a writ of account; and although our statute prescribes minutely the mode of proceeding by that writ, I doubt whether there ever was an instance of such an action having been prosecuted to effect in this state. The settlement of accounts, if they are in any degree long or complex, is improper, if not impracticable, for a jury. The statute, therefore, in the writ of accounts, provides that the accounts shall be submitted to auditors; and, indeed, when questions of account arise at law, in the common action of *assumpsit*, they are pretty generally taken from the jury and submitted by the court to referees, which the courts are authorized to do, with or without the consent of the parties.

I know not of any rule limiting the cognizance of the court of chancery to one species of accounts more than another, or to matters of accounts against persons in any particular relation. Its jurisdiction extends to all matters of account between individuals, in whatever relation they may stand to each other. In this it has no more than a concurrent jurisdiction with the courts of law; for the writ of account at law is given by our statute, 1 Rev. Laws, 94, in all cases where one person is liable to account to another as guardian, bailiff, receiver, or otherwise, and this renders the writ more extensive than it was under the

English law. But it was objected upon the argument that the appellants were in the light of factors or trustees coming into court to have their own accounts stated and allowed against their principal. This, however, they may well do. In bills to account, both parties are considered as actors, or plaintiffs, and the defendant has the same advantage as if he had himself instituted the suit: *Done's case*, 1 P. Wms. 263; *Kent v. Kent*, Prec. in Cha. 197. A trustee may go into chancery to have an allowance made against his *cestui que trust*, out of trust moneys in his hands. Of this we have an instance in the case of *Gould v. Fleetwood*, 3 P. Wms. 251, n. (a). Guardians of great estates in England are said to pass their account yearly in the court of chancery, and this is recommended in Wood's Inst. 73, as a safe way to justify themselves, when the minor at full age shall call them to a general account. Nor is it necessary that the responsibility of the defendant should be established before you can file a bill for an account. In most cases that responsibility as well as the stating of the account will be a point for litigation. It is sufficient that the cause will involve an account in case of the liability of the defendant. Both questions must be more or less connected together in every case, especially as to the extent of the engagement, and how far it will apply in particular instances. It was said, however, that there were no accounts to state and settle in this cause, for the bill charges that Leremboure had admitted the accounts to be just. But the answer of Leremboure declares he admitted them no further than as to the correctness of the calculations; and if he had, his admissions could not have concluded Simond, who would be entitled to have the accounts reliquidated, and the deficiency stated, before the court would oblige him to perform his part of the contract. For these reasons, I think the suit below was properly instituted, and I should regret exceedingly that any opinion which might be given by this court should tend to embarrass the benign and well settled jurisdiction of chancery in the unlimited cognizance of accounts.

Another ground upon which the bill might be sustainable is, that the remedy at law was at least doubtful. This has been repeatedly held as sufficient to give the court of chancery jurisdiction: *Billon v. Hyde*, 1 Atk. 128; S. C. 1 Ves. 831; *Burrows v. Jemino*, 2 Str. 733; *Weymouth v. Boyer*, 1 Ves. Jr. 424. The contract is susceptible of two constructions, upon one of which there was clearly no remedy at law. If we take the contract according to its grammatical construction, Simond was bound

only to indorse the note that Leremboure should give for the deficiency, and the giving the note was a condition precedent to the obligation of Simond. It may be said, however, and that, too, with great force of argument, that unless Simond was bound that Leremboure should give the note as well as that he should indorse it, the security intended by the contract would, in a great degree, vanish. If we assume the first construction, there would be no remedy for the appellants without the aid of the court of chancery, for a suit at law would not lie for not indorsing a note which never was drawn. In such a case the assistance of chancery would become essential to compel the making of the note, or to reach the case of fraud or collusion between Leremboure and Simond, in not giving the note. The uncertainty, therefore, and the difficulty of an adequate legal remedy was sufficient reason for sustaining the bill.

It may be, also, a matter of doubt whether the contract was valid in its execution as a sealed instrument or specialty. The proof, indeed, is, that the witnesses saw the appellants execute the contract; and if we are to understand them as meaning that both the appellants were actually present, and united in executing it, it was a good execution; for several persons may enter into an obligation and bind themselves by one seal: *Lord Lovelace's case*, Sir W. Jones, 268; *Ball v. Dunsterville*, 4 T. R. 313. But it may be well doubted whether the witnesses meant anything more than that the appellants executed the deed in the usual mercantile way, by one of them doing it in the name of the firm; for the appellants state in their bill that they or one of them executed it, and that they supposed such execution to be unexceptionable. If the fact really was that only one of the appellants executed the contract, it was not a good execution at law, and it was necessary to resort to equity to try how far that informality in the execution might be corrected, as it was clearly founded in mistake: *Sheffield v. Lord Castleton*, 2 Vern. 393. Chancery would not help a defective execution of a contract against a surety: *Crosby v. Middleton*, 3 Cha. Rep. 53; and Prec. Cha. 309, *contra*, from whence, in 1 Fonb. 37, the point is considered as doubtful.

But admitting these grounds not to have been sufficient, in the first instance, to have sustained the bill, the respondent came too late to object to the jurisdiction of the court, after he had put in his answer to the merits of the cause. By answering in chief, instead of demurring, he submitted his defense to the cognizance of the court; and equity will, and ought in such

cases, to retain the cause, provided the court be competent to grant relief, and has jurisdiction of the subject-matter, as it manifestly had in this case, the controversy being upon matter of personal contract and of account: *Billon v. Hyde*, 1 Atk. 128; S. C. 1 Ves. 331; 3 Bro. Pa. Ca. 525; Mitford *passim*; Gilbert's Treatise on Chan. 51, 53, 219, 220, 221; *Penn v. Lord Baltimore*, 1 Ves. 446, 447. This last reason why the cause was sustainable in the court below appears to me to be supported on the firmest basis, both from the reason of the thing and the weight of authorities.

Having thus disposed of these preliminary or technical questions as to the jurisdiction of the court, I proceed, secondly, to examine the merits of the case. To perceive that Simond had no beneficial interest in the concern, and was but a mere naked surety for the performance of a specific act, requires only a bare perusal of the contract. The formal beginning and conclusion of the contract do, indeed, seem to carry the agreement of the parties to the whole instrument; but we must examine the body and the scope of the agreement to judge of its meaning and effect. On doing this we shall immediately perceive that the agreement of each party is to have reference only to such particular parts of the contract as apply to him; *reddendo singula, singulis*; and as Simond was only a surety it becomes important to consider and understand well the principles of law which are applicable to him in that character.

It is a well settled rule both at law and in equity that a surety is not to be held beyond the precise terms of his contract and, except in certain cases of accident, mistake or fraud, a court of equity will never lend its aid to fix a [liability on a] surety beyond what he is fairly bound to at law. *Underwood v. Staney*, 1 Ch. Cas. 77, 1 Eq. Abr. 93 k, pl. 2, 6; *Skip v. Huey*, 3 Atk. 91; *Crosby v. Middleton*, Prec. Ch. 309, are cases where chancery has said it would fix a surety for mistake or fraud. *Wright v. Russel*, 3 Wils. 530; *Lord Arlington v. Merricke*, 2 Saund. 411; *Myers v. Edge*, 7 T. R. 254; *Stratton v. Rastall*, 2 T. R. 370; *Simpson v. Field*, 2 Ch. Cas. 22; *Ratcliff v. Graves*, 1 Vern. 196; *Nisbet v. Smith*, 2 Bro. Ch. Rep. 579; *Rees v. Berrington*, 2 Ves. Jr. 540; *Law v. East India Company*, 4 Id. 83, are all cases in favor of sureties. This rule is founded on the most cogent and salutary principles of public policy and justice. In the complicated transactions of civil life, the aid of one friend to another in the character of surety or bail becomes requisite at every step. Without these constant acts of mutual kindness

and assistance the course of business and commerce would be prodigiously disturbed. It becomes, then, excessively important to have the rule established that a surety is never to be implicated beyond his specific engagement. Calculating upon the exact extent of that engagement and having no interest or concern in the subject-matter for which he is a surety, he is not to be supposed to bestow his attention to the transaction, and is only to be prepared to meet the contingency when it shall arise in the time and mode prescribed by his contract. The creditor has no right to increase his risk without his consent; and cannot therefore vary the original contract, for that might vary the risk.

In the present case the respondent agrees to indorse a note for Leremboure; but that note was only to be required on the happening of a certain event. It was not any note that was to be given and indorsed, but it was a note to arise on the deficiency of the proceeds of certain sales at Hamburg, and it was to be given to complete a reimbursement which the appellants were first to seek for by other ways and means precisely defined. The contract provided with a studied minuteness the several modes by which the appellants were to seek a reimbursement. They were first to resort to the policy of insurance made to cover the shipments to Hamburg and which policies were to be assigned to them. But this means could only be resorted to in case of loss on the voyage; and there was no such loss, for the goods arrived safe at the port of destination. "Should this mode of reimbursement not take place" (to use the words of the contract), the appellants were then authorized to draw at sixty days' sight on London, and that, too, twenty days respectively before their notes became due, and to order the necessary remittances to be made by Buildemaker & Co. to meet their drafts. These drafts and orders were of course, then, all to be made and completed by the twenty-second of August, 1799, which would be twenty days before the last of the notes became due; and allowing the ordinary passage to London, the payment of the last bills there would have to be made by the first of December, 1799. This was the second mode of reimbursement provided for by the contract. But should the proceeds of the sales at Hamburg, "so disposed of," to again adopt the terms of the contract, not prove sufficient to reimburse the appellants, Leremboure was to make good the deficiency as soon as ascertained, by a note at sixty days, to be indorsed by Simond. This was the last and final mode of reimbursement,

and upon which the present controversy has arisen. The returns from London of the result of the proceeds of the sales at Hamburg, "so disposed of," would have arrived at New York, in the ordinary course of transmission, by the middle of January, 1800, and this was the ultimate time which resulted from the terms of the contract for the completion of the speculation, and which was to determine the extent of the responsibility of Simond. The calculation as to the time when Simond was to be ultimately called upon is to be deduced from the contract with almost as much precision and certainty as if the contract had expressly fixed it at January, 1800.

The property in question was intended to answer the bills on London, and reimburse the appellants. The remittances, therefore, were to be made from Hamburg by a certain time, because they were to meet a precise object. Both the appellants and Leremboure must have contemplated the sales at Hamburg to be made in the summer of 1799, in order to guard against the immense loss in damages that might result if the remittances were not met in London by the first of December, 1799, to save the bills from being protested. The place of sale was clearly designated by the contract. The property was to be consigned to Buildemaker & Co., at Hamburg, to be sold. The property was insured for Hamburg. The appellants to order the remittances to be made by Buildemaker & Co. to London, and these orders were all to be issued by the twenty-second of August, 1799. The remittances were to be made at the risk of Leremboure, and the contract further adds, that should the proceeds of the sales at Hamburg be insufficient, etc. There was no cover provided for risk in transmitting the property to any other place. The ultimate hazard was to terminate there. From all these facts and circumstances, I consider the intent of the contract to be unequivocal and certain, that the property was to be disposed of at Hamburg. A place of sale intended by a contract is equivalent to a place of sale stipulated by a contract. What, indeed, are stipulations in agreements if they are not acts intended and contemplated by the parties?

This being the contract, let us next see with what precision it was executed. Instead of winding up the speculation, and ascertaining the deficiency in January, 1800, it was not done till October, 1800; and instead of having the tobacco sold at Hamburg, in the summer of 1799, by Buildemaker & Co., it was sent overland a distance of near two hundred and fifty miles, to Rotterdam; most of it not sold till July, 1800, and that, too, by a

different house, Roquette, Buildemaker & Co. What reasons are given for this wide departure from the terms of the contract? It is stated and admitted that previous to the arrival of the cargoes at Hamburg, and which must have been early in June, 1799, many failures had happened among the principal traders there, but the effect that this calamity had upon the market or the price is not ascertained, and we are left altogether to conjecture. There is no testimony as to the price of tobacco there during the summer. It is only proven that, from the month of October to the end of the year, the price of Virginia tobacco was from three shillings fourpence to four shillings, Hamburg currency, per pound, and so continued in 1800; while for the same period the price of Maryland tobacco was considerably higher. I am willing to admit that Buildemaker & Co. might have sent the goods to a different market in cases of necessity; such as those resulting from fire, pestilence, or the invasion of an enemy. But this necessity must be clearly made out, and a strong case shown to justify a factor in changing the place of sale, and the agents who are to conduct it. He, by this, exposes the property to unforeseen accidents, and perhaps disconcerts all the arrangements of his principal. No sufficient cause appears, in the present case, for the conduct of the agents. Notwithstanding these mercantile failures, there was no complaint of a want of market or price, as to the sugars; and it ought not to have been left to inference only, but it should have been made affirmatively to appear that the tobacco could not have been sold during the summer of 1799. If to seek a better market was discreet, was it requisite to go as far as Rotterdam, and pass by many large commercial neutral sea-ports and cities that were much nearer? But this was not all. The property was changed from a neutral to a belligerent port, at the very time, too, when Holland was perishing under the rapacity of French armies, and the scourge of the Russian and British invasion. This was exposing the property to a new, extraordinary, and, in my opinion, a most unwarrantable hazard. In addition to the usual perils of a long transportation and new agents, it was exposing it to the very extremity of war risks.

Admitting, which I am willing to do, that Buildemaker & Co. acted with good faith in this transaction, and that the appellants never gave any directions as to the change of the place of sale; have not the latter done what, in judgment of law, is equivalent thereto? It was a point very much litigated upon the argument, whether Buildemaker & Co. were the exclusive agents of

the appellants, or only the concurrent agents of them and Leremboure. It does not appear to me to be very material to determine this question, either one way or the other; for it is sufficient they were not the agents of Simond. He had no agency or beneficial concern in the shipment, and no agreement even between the appellants and Leremboure to send the property to Rotterdam, could have bound him. The contract as to him could not have been varied without his consent. But I think it results from the case, that the appellants have made the act of Buildemaker & Co. their own. They were to draw bills on London, in the summer of 1799, and to order the proceeds of the Hamburg sales to be remitted there. In this mode, and at this time, they were to seek a reimbursement, and it appears from the account annexed to the bill, that during that summer, they drew on their agents for thirty thousand seven hundred and seventy-seven dollars and ninety cents. It is to be presumed that they were apprised very early of the determination of their agents to send the goods to Rotterdam, for, after the thirteenth of August, 1799, they discontinued their drafts, and from that time they remained perfectly silent and passive, waiting for the returns of the Rotterdam sales, until the eighteenth of September, 1800, when they receive and credit Leremboure with the amount of them, and then, for the first time, call on him for the deficiency. This conduct amounted to an affirmance of the acts of Buildemaker & Co.; for if an agent steps beyond his authority, the principal may at his election, and as best suits his convenience, either consider him as a wrong-doer, or he may affirm his act, and consider him as a receiver of money for his use: Willes' Rep. 407. This latter course the appellants thought proper to pursue, and, therefore, the sound, well known rule of law applies to them, that the subsequent affirmance by the principal of the unauthorized act of the agent is equivalent to an original order. This conclusion appears to me to result necessarily from the facts. Buildemaker & Co. were, generally speaking, the exclusive agents of the appellants, in respect to this mercantile adventure, though, perhaps, under certain circumstances, Leremboure, the *cestui que trust*, might have interfered. But it is not requisite, in the view which I take of the subject, to maintain absolutely this exclusive agency. It is sufficient to say that the transaction was so conducted that Buildemaker & Co. became, in fact, the actual and effectual agents of the appellants, and being so, the appellants not only in the first instance directed, but in the last instance affirmed their con-

duct, by a strict acquiescence for one year, in the sending of the goods to Rotterdam, and then by expressly receiving at their hands the proceeds of the Rotterdam sales. If the appellants intended to have pursued strictly the course of their contract, they ought, so soon as they were informed that the tobacco was sent off, and that the proceeds of the Hamburg sales were insufficient, to have then called on Leremboure with the ascertained deficiency, demanded their note, and left him to have pursued, at his own risk, the property or the agent who had misused it. They would then have been entitled to their note, indorsed by Simond, for the deficiency, however great it might have been. It is their sanction of the conduct of Buildemaker & Co. that makes it their own. By that means they have so essentially varied the terms of the contract that the surety is no longer holden.

The case would not be altered were it really true (of which, however, we have not the requisite proof) that the sending the tobacco to Rotterdam produced a better price. This would be a mere accidental result. It might have been otherwise. But it is the principle in the transaction, the variation of the contract, that discharges the surety. This principle is stable and uniform, not depending upon the fluctuation of markets. Nor will it do to say that Simond shall have credit according to the best price at Hamburg in 1799, and be holden only for the deficiency. The principle that releases a surety under such circumstances is not to be modified by such a concession. It appears that Leremboure was insolvent in October, 1800; but how long antecedently he had been so does not appear. If the contract had been strictly pursued, it is possible that the surety might have indemnified himself, as early as the beginning of the year 1800. The variation of the contract may have thrown him off his guard, and prevented him from holding fast any fund in his possession, or from taking other precautions to indemnify himself until it became too late to do it with success. As we cannot know or anticipate the possible injuries that may ensue from a departure from the terms of the contract, it is proper that the court should lay down and adhere to a general rule on the subject.

For these reasons I am of opinion that the decree of the court below be affirmed with costs.

Per totam curiam judgment of affirmance.

From the frequent citation of this case by the New York and other courts, it will be seen that it is regarded as a case of much importance on the ob-

ligation of a surety as well as on the point of equity jurisdiction. Story, in his work on Equity Jurisprudence, notices the case in no less than eleven sections. He cites it as showing a remedy in equity in matters of account, whether there be a remedy at law or not: Sec. 67; that when a court of chancery has gained jurisdiction of a cause for one purpose, it may retain it generally for relief: Sec. 71; that it would be difficult to maintain that a court of law, by its own act, could oust or repeal a jurisdiction already rightfully attached in equity: Sec. 80; that an agreement by the creditor with the principal for a delay or postponement of the day of payment will discharge the surety: Sec. 326; that the true foundation of equity jurisdiction in matters of account is that a more complete and adequate remedy can be given than at law: Sec. 451; that courts of equity will entertain jurisdiction in matters of account, not only when there are mutual accounts, but also when the accounts to be examined are on one side only, and a discovery is wanted in aid of the account, and is obtained: Sec. 458.

It is regarded with the highest respect as an authority in New York. In *Yale v. Dederer*, 18 N. Y. 276, it was cited on the obligation of a surety, the court adverting to the elaborate examination of the question by the judges who delivered opinions. On the same point it is cited in *Billington v. Wagoner*, 33 Id. 32; in *Corn Exchange Ins. Co. v. Babcock*, 42 Id. 643; and lately in *Atlantic Dock Co. v. Leavitt*, 54 N. Y. 55, it is cited by Earl, J., to the point that where several persons execute a sealed instrument, they may use and adopt the same seal; and to this point it is cited in *Parsons on Partnership*, 180.

In a late case in Mississippi, *Bank of Louisiana v. Williams*, 46 Miss. 618, it was cited as authority on the doctrine of suretyship.

The federal courts have given the highest indorsement to the decision. Thus Swayne, J., in *United States v. Becker*, 21 Wall. 657, says in regard to the liability of a surety: "There is no more learned and elaborate case upon the subject." In *Tyler v. Maguire*, 17 Wall. 288, it is cited to the point that an answer to a bill will preclude a party making the objection that the complainant had a perfect remedy at law, unless the court is wholly incompetent to grant the relief asked. On the point of equity jurisdiction it is cited in *Davis v. Tileston*, 6 How. 120; *Pierpont v. Fowle*, 2 Wood. & M. 30; *Baker v. Biddle*, 1 Bald. 420; *Wood v. Mana*, 1 Sum. 585; *Hunt v. United States*, 1 Gall. 34. On the point of a surety's obligation, in *Bell v. Bruen*, 1 How. 185; *Locke v. United States*, 3 Mason, 453. See *Buchanan v. Bordley*, 1 Am. Dec. 387; and *Baird v. Rice*, Id. 497, for cases on the liability of a surety.

BUSH v. LIVINGSTON.

[2 CALIFES' CASES, 66.]

ASSIGNMENT OF MORTGAGE IMPEACHED FOR USURY.—A security made on a good and *bona fide* consideration cannot be made invalid by a reason of a subsequent usurious assignment. Hence, if a mortgage be assigned to a third person, who pays the amount due thereon to the mortgagee, the mortgagor cannot avoid it in the hands of such person, on account of an agreement to pay him a sum exceeding the money paid and legal interest.

AMOUNT RECOVERED BY ASSIGNEE.—Though the assignment of a mort-

gage express a consideration exceeding the amount actually paid by the assignee, he cannot recover the excess against the mortgagor, but only the money actually paid and lawful interest will be decreed.

RELIEF IN APPELLATE COURT.—If a cause come before the court on an appeal from an interlocutory order, and the whole merits of the case appear, the court will make a final decree, and decide upon the whole merits of the case.

APPEAL from an order of the chancellor. The facts appeared as follows: Livingston being indebted to one Evertson in two several sums of three thousand dollars and two thousand seven hundred and ninety-three dollars, secured by mortgages, and on demand of payment of said sums, which, with interest and other matters, amounted to six thousand two hundred and twenty-two dollars, arranged with Evertson to pay five thousand six hundred dollars cash, and give notes for the residue. Accordingly Livingston applied to Bush and procured him to advance the five thousand six hundred dollars to Evertson, who thereupon assigned his bonds and the mortgage securities to Bush, the assignment expressing a consideration of six thousand dollars. The said sum of six thousand dollars Livingston agreed to pay within ninety days from the date of the assignment, twenty-second of July, 1799. The money not being paid, Bush, in September, 1800, filed his bill to foreclose. Livingston's answer, after admitting the mortgagor's demand of Evertson and application to Bush for money, stated that Bush loaned to Livingston five thousand six hundred dollars for ninety days upon payment, at the expiration of that time, of four hundred dollars for the use of the money; that under pressure of his necessities defendant agreed to pay said sum; that the four hundred dollars was in excess of the legal interest for ninety days on the sum lent, and therefore the securities in the hands of the complainant were void. In support of the answer, Livingston examined Evertson as a witness, and he deposed that the sum paid to him by the appellant was no more than five thousand six hundred dollars, which he considered as a loan from Bush to Livingston, and denied knowledge of any further consideration. Livingston subsequently becoming bankrupt, Bush, in February, 1803, filed a supplemental bill, making one Townsend, the duly appointed assignee, a party.

The chancellor directed an issue to be made to determine whether the assignment to Bush was a usurious contract or one *bona fide* made, and specified as evidence to be read at the trial of the issue, the bill, Livingston's answer, the mortgages and assignments, with the exhibits and proofs taken and used at

the hearing of the cause in the court, "saving to the parties" just exceptions to the said defendant's answer, so far as the same is not an answer to the matters alleged in the said bill of complaint," and any other pertinent evidence.

From this order the complainant appealed, on the ground that specific parts of the bill, etc., should have been designated, and that it had been left to the supreme court to determine what should be deemed an allegation in the bill; and insisted that as the case was now before this court it ought to decree definitely upon the rights of the parties.

Benson and Harison, for the appellant.

Riggs and Hoffman, for the respondent.

By Court, SPENCER, J. The appellant's counsel have insisted on the argument:

1. That so much of Livingston's answer as charges the appellant with usury, is not evidence, and is to be proved *aliunde*;
2. That the order of the chancellor, in leaving at large what part of the answer was to be read, is therein erroneous;
3. That if Livingston's answer is to be received as evidence *in toto*, the charge of usury is not in law established;
4. That an issue ought not to have been directed in consequence of contradictions between Livingston and his own witness, Evertson;
5. That the whole merits of the case being before this court, it will decide thereon definitively, and remit the cause to be carried into execution.

The counsel for the respondents have combated these propositions, and insisted:

1. That independent of Livingston's answer, the fact of usury is made out;
2. That from the state of proceedings in relation to Townsend the charge of usury is established;
3. That from Livingston's bankruptcy he can now be rendered a competent witness, and, therefore, an issue ought to be directed.

In investigating this cause, several of the points raised will not be examined, as a decision on them would be superfluous, from the view I have taken of the subject. It appears to me, from the authorities I have consulted, that, admitting Livingston's answer in relation to the usury to be evidence, and to stand uncontradicted, I still must maintain that there existed no usury as applicable to the bonds and mortgages assigned to

the appellant; and that whether the answer is or is not evidence, still that with respect to the excess of the five thousand six hundred dollars paid by the appellants to Evertson, the testimony of the latter, and the admissions in the bill, show that the appellant cannot recover it.

I now proceed to examine whether the transactions stated in Livingston's answer will, under the notion of usury, deprive the appellant of his right to hold the mortgages assigned to him as a security for five thousand six hundred dollars, and the legal interest which has since accrued thereon. In the research I have made I have met with no authority or even *dictum* that a security for the payment of money, in its inception uncontaminated with usury, can, by an *ex post facto* agreement for a receipt of a greater sum than the statute allows for forbearance, be rendered usurious. In the case read by the respondents' counsel, from 5 Bac. Ab. 419, pl. 6, there was a renewed obligation, in which the usury and the *bona fide* debt were consolidated, and there it was held to be usurious. But this case is not law, as will, I think, be hereafter shown. The first essential to usury is, that there be a loan. Hawkins, in 2 vol. 373, sec. 1, says: "that it is a contract on the loan of money to give the lender a certain profit for the use of it upon all events, whether the borrower make any advantage of it or not, or the lender suffer any prejudice." It is true that it may take place in relation to the rent of lands, or the sale of goods, but as applicable to this case, an inquiry into usury of that kind cannot be necessary.

It is true that the appellant, Livingston, and the witness, Evertson, speak of the money paid by the former to the latter, as a loan from Bush to Livingston. The transaction, however, must decide that point, and not the expressions and language of the parties. Bush says, that Evertson having demanded payment of his debt, Livingston applied to him, and requested him to lend him a sum sufficient for that purpose, and offered to secure the repayment thereof by procuring an assignment from Bush to Evertson; and that, accordingly, on the twenty-second of July, 1799, the assignments were made in due form of law. Livingston states, that being urged by his necessities, he applied to Bush to borrow a sum of money to pay off the bonds and mortgages, and that Bush, taking advantage of his necessities, offered to loan him five thousand six hundred dollars for ninety days, if he would allow him for the forbearance four hundred dollars, to which he consented. That it was then

agreed between Bush, Evertson, and himself, that Bush should pay Evertson five thousand six hundred dollars toward satisfying him for the amount due on the bonds and mortgages, and that Livingston should secure to Evertson what should remain due for principal and interest; Evertson assigning to Bush to secure him the repayment of the five thousand six hundred dollars, and also the four hundred dollars, in pursuance of which agreement the bonds and mortgages were assigned. Evertson deposes that he understood and believed the five thousand six hundred dollars paid him by Bush was a loan from Bush to Livingston, and his reason for so believing was that the money was paid at the request of Livingston for his sole benefit. The transaction between Bush and Livingston was substantially this: Bush to gain four hundred dollars for ninety days' forbearing of five thousand six hundred dollars advanced the latter sum to Evertson for Livingston, upon good and valid securities, and took the assignment as for six thousand dollars.

As between Evertson and Bush there can be no question that the latter became invested with all the right of the former to the sum then actually due on the bonds and mortgages. In fact this payment was not a loan to Livingston, because Bush paid it to Evertson as the consideration of his assignment. If Evertson himself, without the intervention of Bush, had exacted four hundred dollars, or any other sum, from Livingston for forbearance for a limited period, such exactions, however usurious, would not invalidate the *bona fide* securities. In the case of *Pollard v. Scholy*, Cro. Eliz. 20, Pollard sold to Scholy two oxen for six pounds six shillings and eightpence, payable at All Saints next; on the same day Scholy required a longer time; Pollard gave him to the first of May, Scholy paying to him for forbearance three quarters of wheat, which amounted to more than the legal interest. In debt for the six pounds six shillings and eightpence, the defendant pleaded this in avoidance of the contract. The opinion of the justices was, "that the statute does not make the contract void which was duly made, but doth only avoid all contracts for usury, and this last contract is void, being against the statute, but the first was good being made *bona fide*." In 2 Hawk. 377, sec. 17, is this case: "A. was fairly indebted to B. in one thousand one hundred and twenty-five pounds, and on A. desiring time to pay it, B. insisted that one hundred and fifty pounds should be added to the debt, as he would have nothing to do with interest. Accordingly A. gave him five acceptances for these two sums, payable within

fourteen months; and it was held that the *bona fide* debt subsisted, unimpeached by the subsequent usurious transaction." A reference to the reporter, from whom the antecedent decision is taken, fully justifies the summary of the case in Hawkins. The same principle is recognized in *The Queen v. Sewel*, 7 Mod. 119; *Rex v. Allen*, Sir T. Raym. 196; *Abrahams v. Bunn*, 4 Burr. 2253; and in Vin. Ab. tit. Usury, H. pl. 6, it is laid down, "that if the first contract is not usurious it shall never be made so by matter *ex post facto*." The case of *Ferral v. Shean*, 1 Saund. 294, is also to the same effect, that a bond, which was good when made, is not avoided by a subsequent usurious contract for delaying the day of payment.

All these authorities proceed on the wording of the statutes against usury. They forbid the taking more than the rate of interest prescribed, and declare all assurances, etc., whereby more shall be reserved, or taken, to be void. Now if, in this case, the bonds and mortgages in their creation were valid, if no more interest was reserved than the law allowed, how can they conformably to this statute, and the universally concurring expositions of it, become void? If the mortgages and bonds cannot be effected by the charge of usury, much less can the assignment for the reason that this is an act between Evertson and Bush. Evertson was capable of parting with his interest in these securities, and Bush of taking it. Evertson has assigned, for an adequate consideration, all his right to the bonds and mortgages, and this cannot be impeached on the pretense of usury between Bush and Livingston; because, as Livingston is not a party to the assignment, he cannot complain that it is an assurance by which he is bound to pay more than the sum then due on the mortgages.

I think the appellant not entitled to recover more than the five thousand six hundred dollars, and the interest, on two principles independently of Livingston's answer: 1. When Evertson made the assignment, Livingston, as is proved by Evertson, gave him two promissory notes for the balance beyond the five thousand six hundred dollars paid him by Bush. These notes were accepted by him as a payment of so much toward the mortgages and his account, and have since been actually paid in full. The assignee of all choses in action, excepting bills of exchange and notes, takes them subject to all the equities between the original parties. Bush, therefore, though assignee, nominally, for six thousand dollars, can exact no more than Evertson could, and clearly, by transactions between Evertson

and Livingston, before or at the time of assignment, no more, as between them, than five thousand six hundred dollars could be collected on the bonds and mortgages; But, 2. From the appellant's statement of his own case, in connection with the testimony of Evertson, it appears, evidently, that the appellant availed himself of the necessities of Livingston to obtain more than legal interest; and, to use the expressions of Lord Mansfield, "though the transaction itself may not amount to usury, yet it was taking a hard and unconscionable advantage." In the case of *Floyer v. Edwards*, Cowp. 116, it was held, that money thus claimed should not be recovered in an action for money had and received. In a court of equity, whose peculiar jurisdiction it is to relieve in cases of fraud, and whose maxim it is that he who would have equity must do equity, I think there can be no doubt that, apart from the consideration of usury, the appellant ought not to recover beyond the five thousand six hundred dollars and the interest. To this I conceive him well entitled. The principles I have advanced, and the conclusions I have drawn, lead to the most equitable and righteous result. The appellant obtains the money really advanced, with interest, and the respondent is relieved from the advantages attempted to be taken of his distresses by the appellant.

It will be observed that I have abstained from any inquiry into the correctness of the chancellor's order in point of form; because, in my opinion, the issue, if correct in form, would have been upon a point wholly immaterial. The respondents could never have made out more than Livingston alleges, and on his allegations, taking them for true, my opinion has proceeded so far as respects the question of usury.

There remains only one point necessary to be considered; that is, whether this court will finally decide the cause. In the case of *Gouverneur and Kemble v. Le Guen* (1 Am. Dec. 121), this court, on an appeal from the order of the chancellor directing an issue, finally decided the cause and directed the complainant's bill to be dismissed. It did so on precedents from the proceedings of the house of lords, in England, on appeals from chancery and because the whole merits of the case were before the court. When it is considered that there can be no further proofs in the cause, that the whole merits have been discussed and reviewed, that it will save litigation and expense, I am myself contented to be bound by the precedent which has been made. In my opinion, the order appealed from ought to be reversed and an order entered that the chancellor decree the respondents

to pay the appellant, by a time to be limited, fifty-six hundred dollars, with interest from the twenty-second of July, 1799, with costs in the court below to be taxed, or that the respondents be foreclosed their equity of redemption.

Judgment of reversal.

WETMORE v. WHITE.

[2 CASES' CASES, 87.]

WATER-COURSE, AGREEMENT FOR USE OF. — If a stream of water be owned by two persons whose lands are on opposite sides, and they agree to erect mills on the land of one and turn the whole stream to the mills, it will be an appropriation of the water to the mills; and whether held jointly or in common, a release of the interest of one tenant in the mills will carry with it his right to the water.

USE OF WATER AS APPURTENANT. — By a sale of mills the water of the race-way will pass as an incident of the property.

SPECIFIC PERFORMANCE UNDER PAROL AGREEMENT. — Payment of the consideration, possession, and the making of improvements, will take a case out of the statute of frauds, and are sufficient for a decree for specific performance.

APPEAL from the decree of the chancellor dismissing appellant's bill. Appellant filed his bill and prayed for a writ of injunction to restrain the respondents from molesting or disturbing him in the enjoyment of mills, mill-dam, and water of the Saghquate creek, and that he might be quieted in his possession and enjoyment of them, and for such other and further as the court should direct.

The facts of the case will sufficiently appear from the opinion of the court.

Platt, for appellant.

Gold and Henry, for respondents.

By Court, THOMPSON, J. The only question litigated between the parties is touching the right to the waters of the Saghquate creek, for the use of the mills now owned and occupied by the appellant. A brief statement of some of the facts thrown into the case, but not controverted, may afford some assistance in ascertaining the truth with respect to those in dispute. It is admitted, that in the year 1788, the appellant was seised of the lands on the east side of the Saghquate creek, together with an equal moiety of the creek itself. That Hugh White was seised of the lands on the west side of the creek, together with the other moiety of the creek, and that being so seised, they,

together with one Beardsley, built a grist-mill and saw-mill upon the land of the appellant. That a canal was dug for the purpose of diverting some of the waters of the creek to those mills. That the parties continued to occupy them jointly, according to their respective proportions therein for about three years, when the appellant purchased out the shares of his copartners. The purchase from Hugh White was by parol only, and upon this the controversy between the parties arises, presenting the following questions for examination: 1. Whether the appellant ever acquired any right to the waters of the Saghquate creek, for the use of the mills; 2. If so, whether that was a temporary or a permanent right; 3. Whether the purchase being by parol, the respondents can avail themselves of the statute of frauds to avoid it.

The evidence appearing in the case is partly written and partly parol, as to the applicability of which to the subject-matter of complaint in the appellant's bill some little difficulty and confusion arises. The written testimony, the article of agreement, appears not to have had for its object the securing of the water to be diverted from the Saghquate creek. It was between White, Wetmore and Beardsley, and was solely for the purpose of providing for the building of the mills and fixing the proportion of the respective parties therein. The matter of complaint by the appellant's bill is not for a violation of the articles of agreement, but for an interruption in the use of the waters of the Saghquate creek. This written agreement might be admissible as illustrative of the views and intentions of the parties in erecting the mills, and in some measure explanatory of the testimony of some of the witnesses; but the right to divert the water must depend upon some other evidence. The bill of complaint, so far as it may refer to the articles of agreement, is to be considered as a history of circumstances leading to the main subjects of inquiry, the right to the use of the water and the purchase by Wetmore from White. The appellant alleges, that he purchased the shares of White in the mills, together with the privilege of the water, but reposing confidence in the integrity and uprightness of White, he omitted to take a conveyance therefor. This is the subject-matter of the complaint, to which most of the testimony on both sides is pointed, and which the appellant alleges was not secured by writing.

The parol evidence on this subject cannot be viewed as explanatory of the written agreement, or as a preliminary conver-

sation leading to a contract consummated by the instrument in writing; but relating to a distinct and independent subject. An examination, therefore, into the original contract, respecting the water in connection with the sale of the mills, and a decree bottomed thereon, would not, I think, be traveling out of the case, or a violation of the principle that the decree must be *secundum allegata et probata*. That there was a contract made between White and Wetmore, relative to diverting the water to the mills, is manifest from the testimony in the cause, the acts of the parties, and the confessions of White. The extent of that contract will be hereafter examined. To establish this contract, there is the united and uncontradicted testimony of three witnesses.

Lemuel Leavenworth, who was examined both on the part of the appellant and respondents, says the parties went in the first place to view the spot where the mills are at present situated; they then viewed the land on White's side, and it was agreed, in conversation, that wherever the mill was erected "there the water should go." That John Beardsley was to determine where the place should be; and that he determined in favor of the place where the mills now are. To the respondents' interrogatories, he answered that he knew of a verbal contract for appropriating the waters of Saghquate creek to the use of the mill or mills to be erected on the same. Amos Wetmore declared that he had heard Hugh White say that wherever the mills should be built, there the water should go. John Beardsley swore that it was agreed between Hugh White and Wetmore that wherever the mills should be built there the water should go. In conformity to this agreement, we find the parties digging a canal, building a dam across the Saghquate creek, and turning the water to the mills. White in his answer, I think, impliedly admits that there had been a contract relative to the water; though he says the plan "for securing it" had not been matured or carried into effect; evidently, I conceive, alluding to its not having been reduced to writing.

If, then, there was an agreement to divert the natural course of this creek, the object clearly was for the use of the mills. The same reason that existed at first for turning the water would continue to exist as long as the mills remained. By a sale of the mills, generally, I should, therefore, incline to think the water would pass as an incident to them, without any special provision. A contrary inference would be against every reasonable intendment. Supposing the water thus diverted had been

the only water to supply the mills, would there have been a doubt as to the intention of the parties? The quantity of water cannot materially alter the case; and, indeed, it was not denied on the argument but that the appellant had acquired a right to the use of the water, co-extensive with the duration of the mills first built. But it was not necessary to say the right to the water passed as an incident to the mills in the sense above mentioned; or that the appellant acquired this right at the time he purchased the mills. It was, I think, amply secured by a prior contract; and this will account for the language of some of the witnesses, and the guarded expressions in the respondents' answer.

Anna Barnard, a witness on the part of the respondents, testified that she was present at the time of the sale, and that White sold "his right and interest" in the mills, and delivered up his right to the mill and mill-irons, but does not recollect that anything was said respecting the waters of the creek. The reason of this, probably, was because the parties considered the use of the waters provided for by the former contract made before the mills were erected. Hugh White, in his answer, admits that he sold his shares in the mills to the appellant, for the consideration of seventy-five pounds, and that the purchase money has been duly paid. But says, "at the time of his relinquishing his shares no mention was made of any right, interest, or privilege in the waters of the said creek, nor was any such right or privilege included in the said contract of sale of the said mill." With truth, probably, he might so declare, because it was not necessary to say anything on the subject, or include it in the sale, it having been provided for by another agreement. This he does not undertake to deny. He only says the plan was not matured and carried into effect; by which I understand him to mean, as I before observed, that no writings were entered into, deeming them necessary to mature and perfect the contract. I the more readily adopt this construction of this part of the answer, because it reconciles it with the evidence. For if White meant to be understood that no contract whatever had at any time been made respecting the water, he stands contradicted by three witnesses. I consider the effect of this agreement as an appropriation of the water to the use of the mills; that it thereby became, in some measure, an appurtenance to them; and that under such circumstances a grant of the principal subject would pass the water as an incident.

The next inquiry is, whether this contract vested a perma-

ment, or only a temporary right to the use of the water. If I am correct in the construction given to White's answer, it is not such a denial of the contract as to bring it within the rule of equity, making it necessary to establish it by the testimony of more than one witness. That rule can only be applied to cases where the answer is a clear and positive denial of the fact: *Le Neve v. Le Neve*, 1 Ves. 66. But admitting the answer to be a direct denial of any contract respecting the water, I should not consider it, under the circumstances of the case, as coming within that rule. It is impeached by the testimony of several witnesses, and there are other facts and circumstances corroborating the testimony of Beardsley on this subject: *Walton v. Hobbs*, 2 Atk. 19; *Only v. Walker*, 3 Id. 407; *Arnot v. Brisco*, 1 Ves. 97. If Beardsley's testimony is to be received as competent evidence upon which to ground a decree, under the above rule, it establishes, beyond all possibility of doubt, a permanent right in the appellant to the water, for the use of the mills. Beardsley being acquainted with the whole transaction leading to and attending the building of the mills, gives a very minute account respecting the business, and declares most unequivocally that the agreement was that the water diverted from the main channel of the creek was to be for the supply of the mills forever. In this, he stands in some measure corroborated by the testimony of Leavenworth and Wetmore, who say that it was agreed that wherever the mills should be built, there the water should go. The latter declared, also, that when White sold his right and title in the mills to the appellant, he supposed the use of the water perpetually was intended to be sold.

It is said, however, that Beardsley has so contradicted himself with respect to the consideration paid by Wetmore to White for the water, that he is unworthy of credit. This allegation I do not think well founded. In his answer to the appellant's interrogatories, on this first point, he says that White was to have one-fourth part of the mill, on account of his allowing the water to be turned from the main creek for the use of the mill forever, and for digging, draining and turning the water; and in consideration of other things mentioned in a certain written contract. In his answer to the respondent's interrogatory, he says the consideration that Wetmore paid White for the use of the water was, that the waters overflowed the lands of Wetmore, and that White was to have one-fourth part of an acre of land forever, with the mills erected thereon; one-fourth of the grist-mill, and one-third of the saw-mill, and that

he supposed the said contract was completely finished and carried into effect. The latter examination is more full and circumstantial than the former, but is not, I think, so essentially variant as to discredit the witness. There is to me internal evidence arising from the nature of the establishment and the acts of the parties, fortifying the conclusion that it was the intention of the parties that so much of the water of the Saghquate creek as was necessary for the use of the mills should be permanently appropriated to that object. A contrary conclusion would lead to great doubt and uncertainty. If the appropriation was considered as co-extensive with the necessity that at first existed for mills at that place, its termination would depend upon mere matter of opinion. If with the duration of the mills first erected, doubts might arise to what extent repairs might be made for the purpose of continuing the old mills; and to say that they should be suffered to go to decay, without any repairs, would be doing violence to the understanding of the parties. Public accommodation and private emolument were probably the primary inducements for building the mills and diverting the water; the same reasons, for anything that appears, now exist for their continuance.

The conduct of White in not disclosing to Wetmore, at the time of selling the mills, his claim of restoring the water to its original channel, his sleeping so long upon this claim, and permitting the appellant to expend his money in repairing and rebuilding the mills, were unconscientious, and form strong grounds for the interposition of a court of equity: *East Ind. Co. v. Vincent*, 2 Atk. 83. It is true the respondent, Hugh White, swears that he verily believes he apprised Wetmore of his claims before the mills were taken down or destroyed. This I do not think entitled to much weight. If the fact would warrant it, he ought to have sworn positively, and not merely as to his belief. Besides it is rendered highly improbable by his acquiescence for five years together. Much was said on the argument respecting the injury which the diversion of the water would occasion to the respondents' meadows, and much of the testimony in the cause was pointed to that object. This testimony is vague, uncertain, and, in my opinion, irrelevant. If testimony of this kind was proper at all, as furnishing a clue to the intent and understanding of the parties, it should have been confined to the time when the contract was made; and on that subject we have the estimation of White himself; for it appears from the testimony of Beardsley that he considered the water of

so little use to him, and the establishment of the mills so unpromising in point of profit, that he offered to give the appellant and Beardsley the use of the water forever, together with a barrel of pork, if they would build a grist-mill and saw-mill alone, and he to have no concern with them.

The appellant's claim resting altogether upon parol contracts, it becomes necessary to examine whether any obstacle to relief is interposed by the statutes for the prevention of frauds. I think there is not. It is an established rule in equity that a parol agreement in part performed is not within the provisions of the statute: 1 Fonb. 182, and the cases there cited; *Lacon v. Mertins*, 3 Atk. 4. To allow a statute having for its object the prevention of frauds to be interposed in bar of the performance of a parol agreement in part performance would evidently encourage the mischiefs the legislature intended to prevent. Money laid out in improvements is considered a part execution of a contract: Pow. on Cont. 296. So also possession, delivered in pursuance of an agreement, is such a degree of performance as to take a contract out of the statute: *Id.* 299. Payment of the consideration money has always been held as a part performance: *Lacon v. Mertins*, 3 Atk. 4.

The case before us, I think, clearly falls within these rules. The consideration money has been paid, possession taken, and valuable improvements made; I can, therefore, see no objection against granting the appellant such relief as will quiet him in the permanent enjoyment of the water for the use of the mills to the extent the same was used and enjoyed at the time he purchased them from the respondent, Hugh White. This is sufficiently certain and definite for a decree of specific performance.

I am, therefore, of opinion that the decree of the court of chancery ought to be reversed.

Judgment of reversal unanimously.

Referring to this case in *Ham v. Goodrich*, 33 N. H. 38, it is remarked: "In *Wetmore v. White*, it is said by Thompson, J., that payment of the consideration money has always been held to be part performance; but the opinion thus expressed is not based upon a review of the authorities, and the only case cited in support of the position is the case of *Lacon v. Mertins*. Like the *dictum* of Lord Hardwicke in that case, the opinion of Thompson, J., is extrajudicial—the same facts—possession delivered and money expended in improvements, existing in that case as in the case of *Lacon v. Mertins*."

Both Story and Willard, in their works on Equity Jurisprudence, notice this case as authority on the point of specific performance being decreed,

under a parol agreement, when there has been a part performance: See 1 Story Eq. sec. 761; Willard Eq. 285. The case is also cited by Angell on Water-courses, secs. 107, 159, 320; and Washburne on Easements, 45. The latest authoritative indorsement of the case in New York is in *Eyes v. Dox*, 34 N. Y. 312, on the point of specific performance.

MUNRO v. ALLAIRE.*

[2 CAINE'S CASES, 183.]

EXECUTOR PURCHASING TRUST ESTATE.—Where a power is given to an executor to sell for the benefit of a third person, a purchase by the executor from his *cestui que trust* is not favored in equity, and he cannot maintain a bill for a specific performance based on such purchase.

SAME, WHEN ALLOWABLE.—It seems that a purchase by a trustee, who is also a *cestui que trust*, may be sustained, if it be to save the property from loss.

APPEAL from an order of the chancellor, overruling appellants' demurrers to respondent's bill. The principal facts appeared as follows: Allaire, the respondent, and one Griffen and Mary Palmer, the wife, were the executors of the estate of Benjamin Palmer, deceased. Allaire entered into an agreement with Mary Palmer, also the principal legatee, for the purchase of the estate, agreeing to give therefor six hundred pounds, and engaging to pay all the charges against the estate. Mary Palmer accordingly executed a conveyance of the property, real and personal, to Allaire, promising further assurances should this conveyance prove defective, and took from Allaire a bond for three hundred and twenty pounds, the purchase money remaining unpaid, and a mortgage of the property to secure the same. Subsequent to this transaction Munro and Sniffin, with full notice thereof, purchased the premises from Mary Palmer, and took possession of the greater portion of the estate. Whereupon Allaire filed his bill against Munro, Sniffin, Mary Palmer and Griffen for an accounting on the part of Munro, and a specific performance of the agreement between Mary Palmer and Allaire for further assurance. Demurrers to this bill were interposed, which being overruled by the chancellor, an appeal was taken to this court.

BENSON, J. This is an appeal from the orders of the court of chancery, overruling the several demurrers of the appellants to the respondent's bill. The intent of the respondent's bill in the court of chancery is, that he may have a specific perform-

* This case is reported out of its chronological order by Caines, but it is considered best to give the cases in the order as reported by him.

ance of his agreement with the appellant, Mary Palmer, whereby she bound herself to convey to him, by good and sufficient conveyances in the law, all her estate, right, title and interest, whatever, to the estate of her late husband, and that he may receive a more perfect assurance and conveyance of the said estate.

To that end the other appellants are also brought into court, either as confederates with her, or as subsequent purchasers from her with notice. Several questions have been raised and argued by the counsel on both sides. An opinion by the court on each of these questions would be unnecessary. It is, therefore, to be forborne, it being sufficient for a decision against the respondent, that he had at any time, as a trustee, a power over the property so agreed to be conveyed; and whether this property existed in the shape either of money or of land, makes no difference. The demurrers by the appellants, therefore, were well taken, it being a principle that a trustee can never be a purchaser; and I assume it as not requiring proof, that this principle must be admitted not only as established by adjudication, but also as founded in indispensable necessity, to prevent that great inlet of fraud, and those dangerous consequences which would ensue if trustees might themselves become purchasers, or if they were not in every respect kept within compass. Although it may, however, seem hard that the trustee should be the only person of all mankind who may not purchase; yet, for the very obvious consequences, it is proper the rule should be strictly pursued, and not in the least relaxed. Therefore, far from discerning the respondent's case as an exception, supposing the rule to be only general and not universal, I would remark that notwithstanding the averment in the bill, that Mary Palmer fully understood the agreement and conveyance, and independent of the circumstance that she was not able to read or write, whoever will merely look at the conveyance, which is set forth at large in the bill, will instantly perceive that the parties, or other persons who are named in the bill, as friends or agents in the transaction, did not know what she had by the agreement agreed to convey; whether an estate in the land, or her eventual interest in the money to arise by the sale of the land; or in what manner, or to what extent these acts were susceptible of effect, or even whether they were not altogether nugatory. The conduct of the parties, and every other person having any other agency in a bargain so made, without due knowledge or advertisement, is, to say the least of it, indiscreet, irregular, unfit, and certainly to be

discountenanced. I am, therefore, satisfied of the justness of this principle, that a court of equity ought never to aid a party to have the bargain enforced or perfected, with intent that any profit or advantage should be taken by it; the interposition of the court, if any, should be only to avoid or relieve against a loss or damage.

The principle, as quoted from the adjudications, is in terms without qualification or exception. A trustee can never be a purchaser, etc., and, without some explanation, I may possibly be considered as understanding it in its apparently absolute sense. I will, therefore, briefly mention that the cases where the suit is against a trustee to set aside a purchase, he having procured the requisite formal legal title, are to be distinguished from those where the suit is by him to effectuate a purchase, either by having the thing purchased decreed to him specifically, or by having the means decreed to him whereby he may recover at law. That in the latter case, it appears to me that the rule is to apply as unlimitedly as it is expressed; but that, in the former case, a court of equity will not always interfere as of course; for, if the *cestuis que trust* will agree to allow the purchase, it may be allowed without fear from the precedent; and that it is not, in every instance, indispensable that all the *cestuis que trust* should agree to waive the implied fraud; it may be sufficient for a majority, or such other number or proportion of them, to agree, as that, according to the circumstances of the case, it may be presumed there was no fraud in fact. It only remains to be noticed that if the agreement and conveyance are to be without effect, Mary Palmer ought not to retain the bond and mortgage against the respondent. She is, nevertheless, entitled to hold them until he shall make her an offer to relinquish the agreement, and to deliver up the conveyance he now holds against her to be canceled. It is not possible for the respondent to allege an offer to that purpose, and to conform the prayer of his bill and his petition to it, in consequence of any answer which the appellants could be compelled to make to the bill, and it is a rule that every decree must be according to the form of the petition; so that, if the respondent is to be relieved against the bond and mortgage, he must proceed *de novo*, and as he shall be advised.

My opinion is, that the order appealed from be reversed.

Judgment of reversal.

See the case of *Bergen v. Bennett*, ante, 281, on the point of a trustee's purchase of the trust property.

CASES
IN THE
SUPREME COURT
OF
NEW JERSEY.

GARRETSIE v. VAN NESS.

[1 PENNINGTON, 20.]

LIABILITY OF ASSIGNOR OF BOND. — The assignee of a bond cannot sustain an action against the assignor on the failure of the obligor to pay by virtue of the assignment only.

Action by the assignee of a bond against the assignor. The declaration contained two counts: 1. A special count stating the assignment, the recovery of a judgment against Vandel, the maker of the bond, and the return of the execution unsatisfied; 2. A count for money had and received.

The cause was tried before PENNINGTON, J., at the September circuit, 1804, when it was agreed that the verdict should be taken for the plaintiff, with liberty to the defendant to move the court in banc to set aside the verdict, and for a nonsuit, on the question of law arising in the case.

Williamson, for the defendant, in support of the motion for nonsuit, contended that assignment implied no covenant of indemnity, but was only an agreement that the assignee might receive the money to his own use: Wood's Inst. 281; 12 Mod. 555; 1 Lord Raym. 683; 2 Id. 1242; 1 Str. 450; 1 Dallas 449, 255; Addison's Rep. 55; Kirby, 50. No notice of demand and non-payment had been averred and proved. The implied warranty was as to the ownership, not to the value: 2 Bl. Com. 452. It does not appear that any money had been actually received, which is necessary to support the action for money had and received.

McWhorter and Stockton contended, on behalf of the plaintiff, that the assignee of a bond, by virtue of the assignment, could

recover of the assignor, in case of the failure of the obligor, upon the implied promise. An action of covenant might be maintained on the word assign: 12 Mod. 554; 1 Id. 113; 2 Lord. Raym. 1242. The assignment was evidence of the payment of money sufficient to support an action for money had and received: *Mackie v. Davis*, 2 Washington, 219. (1 Am. Dec. 482.)

KIRKPATRICK, C. J. By the principles of the common law, a bond, being a chose in action, could not be assigned or granted over. It was thought to be an encouragement to litigiousness, and to cover maintenance, to suffer a man to make over to another a mere right of going to law. This nicety, however, came in process of time to be in some measure disregarded; and though the assignment was in form but an appointment of an attorney to sue for and recover the money due in the name of the obligor, yet where it was made for valuable consideration even courts of law would take notice of the real interest of the parties, and protect the assignee. The legislature, however, have thought fit to change the law in this respect, and have declared that assignments of bonds shall be good and effectual in the law, and that the assignee may maintain an action of debt thereupon in his own name. Instead of being the agent or attorney therefore of the obligor to receive the money, with an equitable lien thereupon to reimburse himself for what he may have advanced on the assignment, the assignee, by this act, becomes the absolute owner of the property. Bonds by this means, like personal chattels in possession, are thrown into open market.

The question is, shall the assignor be liable on the assignment in case the obligor fails? It is admitted on all hands, that there is nothing in the act making bonds assignable that can at all affect this question. It must be determined upon general principles. The case of *Deering v. Farrington*, in 1 Mod. 113, has been cited by the plaintiff's counsel, to show that the word assign in itself implies a covenant, and is sufficient to support this action. But this case, I think, has been misapprehended. It is more fully stated in 12 Mod. 554. There one had assigned all the money that should be allowed him by the town of Hamburg in lieu of his share of a certain ship; but afterward himself received the money; and for this money the action was brought, and it was adjudged for the plaintiff. This was a receiving of the money by the assignor himself, contrary to his contract. It has no resemblance to the present case. Again, it is

said that an action would lie by the assignee against the assignor of a promissory note, which is a chose in action, before the 3 and 4 of Ann, which puts promissory notes on the same footing with inland bills of exchange; and for this the case of *Lambert v. Oakes* is cited from 1 Ld. Raym. 443. And it is urged that upon the same principle, an action will lie by the assignee against the assignor of a bond. It is manifest, from 2 Ld. Raym. 757, as well as from 3 Bac. 605, that sundry attempts were made before the statute of Ann to bring promissory notes themselves within the custom of merchants, by considering them, and likening them to bills of exchange; and, indeed, it would seem that this notion had prevailed to a considerable extent. The probability is that to aid these attempts, and in conformity with the notion, indorsements were made in the common form of bills of exchange; and that they were really considered as new bills drawn on the ground of the money due on the notes. Lord Mansfield says, in 2 Burr. 676, that the indorsement of a note is an order by the indorser upon the maker of the note, his debtor by the note, to pay the indorsee. And this is the very definition of a bill of exchange. Though the courts, therefore, successfully resisted the attempt to bring the notes themselves within the custom of merchants, yet the indorsements, being probably in form, and certainly in their substance, bills of exchange, were declared upon and recognized as such. The indorser became liable upon the custom of merchants, and not upon any implied covenant or promise contained in the indorsement, distinct from that raised by such custom. In the case of *Lambert v. Oakes*, it was holden, in substance, that the indorsee had but to demand the money of the maker of the note, and if it were refused, he had his action against the indorser; and that for the whole amount, even though it had been indorsed upon a discount. Now can it be pretended that this would be the effect of an assignment of a bond? Is there any case to give color to such a construction? I can find none. Bonds are instruments of a different nature. They are made for different purposes; for more permanent securities; for payment of money usually at more distant days. They never have been cast into the mercantile world, and passed as cash from hand to hand like notes and bills, neither in this, nor, so far as my information goes, in any other country. With the principles of the law merchant, as negotiable paper, they are altogether unconnected.

A case has been cited as determined in this court some years ago, in which this question arose, and in which the action was

sustained. I mean the case of *Mehelon v. Barnet*. I remember that case. I was the attorney on record for the plaintiff, and the decision was so. It is to be remembered that before the act making bonds assignable, the assignee, as I have before stated, was, in contemplation of law, but the attorney or agent of the obligee to recover the money, with a lien upon it, when recovered, to reimburse himself for what he had advanced. If, therefore, he made use of all that diligence for the recovery of which a faithful agent or attorney ought to use, and the money were notwithstanding lost, it was lost to the assignor, and that upon the strictest legal principles. The only question in those cases between the assignor and the assignee was of due diligence. And the case turned upon this question in *Mehelon v. Barnet*.

But now that bonds are made assignable in law, that the property absolutely passes by the assignment, and that they are put upon the same footing with personal property in possession, the buying and selling of them must be governed by the same law. This law is laid down in 2 Bl. Com. 455: "A purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own, and the title proves deficient, without any express warranty for that purpose. But with regard to the goodness of the wares so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer." This I take to be the correct principle of the common law. And however it may have been made to bend to the equitising imaginations of some lawyers of late in England, yet still it is the law of New Jersey. In the case before us, there was no pretense of warranty given in evidence, or of concealment or disguise, or of misrepresentation. It was pretended, it is true, to set up some parol averment at the time of the assignment, but it was overruled by the judge who tried the cause, and, I think, upon the soundest principles. As to the doctrine of the consideration having failed, it has no application here, nor indeed is it insisted upon by the plaintiff.

Upon the whole, I am of opinion that the bonds and bills for payment of money, under the act of the legislature, may be bought and sold, subject to the provisions therein mentioned, in the same manner as other personal things in possession; that the seller is subject to no hidden covenant, promise or fetch,

but that the transaction must rest upon the same general principles which govern all other sales of personal chattels. In my opinion, therefore, there must be a judgment of nonsuit.

ROSSELL, J. This cause rests on the single point whether the assignor of a bond is liable to the assignee should the obligor be unable to pay the sum conditioned for in the bond. I have never understood that he was, provided due diligence was used by the assignee, and until I heard this question so ably argued at this bar, had not a doubt on the subject. I confess, from the many authorities cited by the gentlemen in favor of a contrary opinion and the ingenuity of their arguments, I was very strongly inclined to believe myself in error. On a more close examination of the question, I, however, adhere to my first impressions. In 1 Raym. 683, Chief Justice Holt lays it down as law that "though a bond is not assignable in point of interest, it is a covenant that the assignee shall receive the money to his own use." Hale, Chief Justice, lays down the same principle precisely in 1 Bacon, 538. And I cannot but think that the words "shall receive" have a more extensive meaning than the one assigned them by the counsel for the defendant. And in this opinion I am strongly supported by that of our late Chief Justice Kinsey, who, in the case of *The Administrators of Lloyd v. Bloomfield*, tried at Burlington, recognizes this doctrine in its fullest extent, and expressly states that "an assignment implies a covenant that the obligor is able to pay." This, as far as my knowledge extends, is also the general understanding of the country; and from which only the understanding of the parties at the time of making the contract can be collected when it is not expressed. But the sale of bonds is likened unto that of horses in which the seller, without an express warranty, is said not to be liable; although I do not for several obvious reasons think this similitude correct, yet if it is, the more modern doctrine that a fair price implies a warranty, is, in my opinion, the most just and reasonable. If law, as it is said to be, is founded on justice and is the perfection of reason, it should compel a compliance with the fair and honest intentions of the parties at the time of making the contract. Suppose A. the owner of a horse in the possession of B., and being desirous of turning him into money offers him at a fair price to C., who knowing the horse and wanting one pays A. for him. No warranty is asked or given; both parties are satisfied; one in believing that he has parted with his horse for his value, the other that he has a fair equivalent for his money. It afterward appears that before the

sale the horse, without the knowledge of the parties, had by some accident become totally useless; is then the spirit of the contract complied with and the honest expectations of the parties fulfilled? Most certainly not. It will not be disputed if A. had been acquainted with the useless situation of his horse, and had thus imposed him on C. at a fair price, but that he would have been equitably liable to the purchaser for the money paid. It is a well known principle of law "that the obligations of natural justice are as strong as the most express promise," and A. not having given to C. what he himself at the time of making the contract believed to be a just and fair equivalent for his money is bound in conscience to make him whole. This reasoning will equally apply to bonds. A. advances money on bond of B. to C., the obligee. If A. could have supposed B. unable to pay, he most certainly would have kept his money. If C. knew at the time of sale the obligor to be insolvent, he acts dishonestly. If he assigns the bond under the idea that he gives value for the money received and it appears he was mistaken, he is bound to do justice to A., whose money he has taken without any equivalent, contrary to his expectations, or even wishes, if he is an honest man. I, however, do not conceive that it is of so much consequence how this question is decided, as that it should be permanently settled and rightly understood. But for the reasons before given, as well as for the sake of uniformity in our decisions, I am of opinion that the defendant below take nothing by his motion; and that judgment be entered for the plaintiff.

PENNINGTON, J. The simple question in the case is, can an action be sustained against the assignor of a bond by the assignee, on failure of the obligor to pay, and this in virtue of the assignment only, the case steering clear of fraud, deceit or express warranty, or any special undertaking on the part of the assignor, to indemnify or any way save harmless the assignee, in case the obligor should fail to pay, no express promise being proved or even alleged. This action is bottomed on an implied promise of the assignor, arising out of the nature of the transaction, to refund to the assignee the consideration he received of him for the assignment, in case the obligor should be unable to pay. In the sale and assignment of bonds, I have always considered the transaction to import nothing more than that the assignor transferred to the assignee his interest in the bond, with an authority before the statute making bonds assignable, for the assignee to sue in the name of the assignor, and since

the statute, in his own name. An assignment is defined to be the appointment and setting over a right to another: Wood's Inst. 281. The language of the assignment, in the case under consideration, is in accordance with this definition, to wit: "I do assign all my right, title, interest and claim whatsoever I have, unto the within bond unto Henry Garretsie." Whatever right the defendant had he transferred to the plaintiff. In the assignment of instruments relative to land, it is said, in Wood's Inst. 282, to be necessary to insert a covenant, on the part of the assignor, that he is owner in possession, and hath power to assign, shutting out the idea of an implied covenant or agreement altogether. Whether the simple assignment of a bond raises a covenant or agreement by implication that the assignor is the true owner of the bond, and hath power to assign, and that the money is *bona fide* due, is a question that it is time enough to determine when it is raised. But that there is an implied contract growing out of the transaction that the assignor will pay if the obligor is unable, is wholly unsupported by any authority, ancient or modern, except the case of *Mackie's Executors v. Davis*, determined in the Virginia court of appeals, in 1796, cited by the counsel for the plaintiff, from Washington's reports. (1 Am. Dec. 482.) This decision appears to have taken place, partly from the peculiar customs of Virginia, and partly, as I apprehend, from the improper confounding the common with the mercantile law. It is true that the law merchant is part of the common law; it hath been, for public convenience and the benefit of commerce, adopted by and incorporated into it. But it is still confined within its original limits, and doth not extend to subjects of which before it had no cognizance. We might as well look into the mercantile law for the origin of feoffments, knight service, gavel-kind, or socage tenures, as for doctrines respecting the assignment of bonds. The right of the indorsee of a foreign bill of exchange to recur back to the indorser or drawer, in case of the failure or refusal of the drawee, is purely of mercantile origin and confined by the law merchant to that species of negotiable paper. A little more than a century ago, owing to the increase of domestic commerce, inland bills of exchange began to be treated as foreign bills; and in the reign of William the third, were by act of parliament put on the same footing as foreign bills of exchange. The commercial spirit of the nation carried this still further, so much so, that promissory notes were, in the reign of Queen Ann, put on the footing of inland bills

of exchange; in both these cases, however, acts of parliament were thought necessary to legalize the practice. The exact resemblance that inland bills of exchange have to foreign, very naturally led to the first; a supposed resemblance (for which we are indebted to mercantile ingenuity) between indorsed notes and bills of exchange, produced the second. The assignment, or what is now called the indorsement of a note, was considered as an order drawn by the payee of the note on the maker of the note in favor of a third person, commanding him to pay the contents thereof; and as such resembled a bill of exchange. The maker of the note was considered as the drawee or acceptor of the bill; the indorser as the drawer; and the indorsee as the payee; and as notes are found to be of great use in commercial operations, a convenience has grown out of the invention. But to extend this doctrine to bonds and other sealed instruments without the authority of any statute, would, as I apprehend, be outraging as well the common as the mercantile law.

It is said, however, by the learned counsel for the plaintiff that bonds in this country are in the same situation that promissory notes were in England before the statute of Ann. In this I think they are mistaken, from the supposed resemblance between indorsed notes and bills of exchange above mentioned; a practice had obtained in England before the statute of Ann, of treating indorsed notes in all respects as bills of exchange. It appears by the case in *Carthew*, 269, and the observations of Lord Chief Justice Holt, which I shall presently take notice of, that they were declared on under the custom of merchants. In the first year of Queen Ann, this practice came up judicially before the court of king's bench in the case of *Clarke v. Martin*, as reported in 2 Ld. Raym. 757, when Lord Holt said "that the maintaining these actions upon such notes were innovations upon the rules of the common law, and invented in Lombard street, which attempted in these matters of bills of exchange to give laws to Westminster Hall. That the continuing to declare upon these notes upon the custom of merchants proceeded from obstinacy and opinionativeness, since he had always expressed his opinion against them." The next year the same question came up again in the case of *Buller v. Crips*, reported in 6 Mod. 29; Lord Holt still expressed his opinion against the practice. This opinion of Lord Holt, concurred in by the court of king's bench, no doubt gave rise to the statute 3 and 4 Ann, passed the next year, putting promissory notes on the same footing as in-

land bills of exchange. It surely will not be pretended that the same practice hath obtained in this country, or at least in this state, of treating bonds, as had obtained in England before the statute of Ann, in respect to promissory notes. The declaration in this case does not treat the bond as a bill of exchange, the action is not founded on the custom of merchants; and if it had been, it would have been demurrable for that cause.

An assigned bond must be considered as a bill of exchange, or a mercantile negotiable paper, in the nature of a bill of exchange, or it must not. If the first, then it must be treated as such throughout; it must be declared on under the custom of merchants, a demand on the obligor, who in this respect must be considered as the acceptor of the bill, must be substantially alleged in the declaration, and his refusal or neglect to pay; also notice to the assignor, who is to be considered as the drawer of the bill, must be laid and the whole proved on trial. If the latter, then the instrument must be considered as at common law, and the law merchant shut out of the case. We cannot adopt an amphibious practice, running into this or that law, as we may find it accord with our present notions of equity and justice. I am aware that Roane, Justice, in the case cited from Virginia, is represented as holding an opinion that the right of the indorsee of a bill of exchange to resort to the drawer or indorser, in case of the failure of the drawee to pay, is founded on the common and not on the mercantile law. There are some *dicta* in the books that at first view countenance the idea; but on investigation it will be found that these writers have confounded the common with the mercantile law; probably, considering that the former had merged the latter; and make use of the general words common law in contradistinction to statute law, for it is in that relation they use the words. The opinion of the learned judge is a perfect novelty to me, for I have always understood that a bill of exchange was of mercantile origin; that its qualities, effect and operation were fixed and governed by the custom of merchants which had universally obtained among commercial nations before it was adopted by the common law of England. That the right in question had its origin solely in the custom of merchants, and I find this opinion supported in 4 Bacon, 685; Cro. Car. 301; Carthew, 510, and the precedents of declarations in cases of foreign bills of exchange. I am of opinion that the right of the indorsee to recur to the drawer or indorser, in case of the failure of the drawee to pay, is derived solely from the law

merchant; that although the common law hath adopted the law merchant, yet it hath not extended or applied its principles to bonds or other writings obligatory; nor hath our act of assembly legalizing the assignment of bonds changed the law in this respect; therefore, that the plaintiff cannot prevail unless on the count for money had and received, which is the next thing to be considered.

The material grounds of this count is that the defendant hath received a sum of money of the plaintiff, which, in a legal point of view, he cannot in equity and good conscience retain. In the first place, no evidence was given at the trial that any money was paid; the consideration for the assignment of the bond might have been land or goods, or even love and affection. But supposing money had been paid, on what ground shall it be returned? Fraud or extortion is not pretended, the money could not have been paid by mistake, nor under a void authority. But the counsel for the plaintiff contend that it was paid on a consideration which happened to fail, which leads to an inquiry after the consideration. This was that the defendant should transfer all his right, title and interest in the bond, and the money due thereon to the plaintiff. This was done, and this chose in action completely vested in the plaintiff. The consideration was that the plaintiff should stand in the shoes of the defendant, as to his right in a chose in action. This was a lawful *bona fide* transaction, vesting in the plaintiff, the assignee, the whole of the defendant's right to the thing assigned. It was proved at the trial that the obligor was at the time of the assignment in good standing, and that there were no suspicions that his circumstances were bad. It appears to me that this was a real substantial consideration, and that the defendant may conscientiously retain the money, provided there has been any paid. If the bond had been void by circumstances unknown to the plaintiff, at the time of the assignment, the consideration for the money advanced would have failed; he would not have got, from the nature of the transaction, what it was intended he should have; that is, a valid bond against the obligor in his own right. The loss here was a subsequent loss, and may be compared to the accidental burning of a house, or death of an ox after purchase and delivery. Supposing one man was to pay another one hundred dollars for the use of a piece of land a year, and a hurricane should destroy this whole crop, could he recover the money back again, under the idea that it was paid for a consideration which happened to fail?

Most certainly not. He had what he paid his money for, a chance of raising a crop. On the whole, I am clearly of opinion that on neither count can this action be sustained; and that the verdict must be set aside, and judgment of nonsuit entered.

Judgment of nonsuit.

The decision in this case is contrary to *Mackie v. Davis*, 1 Am. Dec. 482. *Mackie v. Davis* is, however, well supported in the Virginia courts. See *Barkesdale v. Fenwick*, 4 Call, 502; *Dunlop v. Harris*, 5 Id. 43; *Goodall v. Stuart*, 2 Hen. & Munf. 114; *Smith v. Triplett*, 4 Leigh, 599; *Saunders v. Marshall*, 4 Hen. & Munf. 455, where the case is cited and approved.

The decision in New Jersey is supported by *Looney v. Pinkston*, 1 Overton, 384; *Laurence v. Dougherty*, 5 Yerger, 435; *Whiteman v. Childress*, 6 Humph. 303; *Walker v. Scott*, 2 Nott & Mc. 286; *Robinson v. White*, 4 Litt. Ky. 238; *Jackson v. Crawford*, 12 Serg. & R. 165. It is believed the decision in New Jersey is the more correct, and better supported by authority.

COOK v. BARKLEY.

[1 PENNINGTON, 169.]

ACTION OF SLANDER, MITIGATION OF DAMAGES.—In an action for slanderous words, the defendant may give in evidence on the general issue, in mitigation of damages, the manner and circumstances of speaking the words, and that they were in circulation, and reported by others, and that he only repeated them.

ACTION for slander brought in the court of common pleas by the Rev. David Barkley against the plaintiff in error, Dr. Ambrose Cook. The first count of the declaration charged the defendant with falsely, maliciously and wickedly speaking the following false and slanderous words of the plaintiff: "He was ketched with Mrs. Cain by the board fence and had to do with her, and I can prove it."

The second count charged these words: "It can be proved that Mr. Barkley was ketched with Mrs. Cain and had to do with her."

The third count charged the following words: "He is great with Mrs. Cain, and hath committed adultery with her, and I can prove it."

The defendant pleaded not guilty to all the counts, and gave notice that at the trial he would give in evidence that it was reported that the plaintiff was guilty of the charges contained in his declaration.

On the trial the plaintiff gave in evidence, by one Jeremiah Fisher, that in a conversation the witness had with the defendant, he stated to the witness, that it was now said the plaintiff had been found at the board fence with Mrs. Cain and had to do with her, and that this fact would be proved by the boys of one Howell. The defendant left the impression on the witness' mind that the plaintiff had criminal intercourse with Mrs. Cain. The witness, on cross-examination, stated that this conversation took place in the shop of one Robert Hughes, a hatter, the said Hughes being present. Another witness, John Harriot, stated he was a member of the sessions in the plaintiff's congregation, and that having heard reports against the plaintiff, he made inquiry of several persons as to their truth, and the defendant told him that something ought to be done respecting the charge against the plaintiff, and that there was a woman in the mountain who knew a good deal about him. Thereupon the witness requested the defendant to put this matter in writing and hand it to him, which he did, but returned it to the defendant, who afterward produced it before the sessions of the congregation. The plaintiff further gave in evidence, by one Nancy Sebring, that on meeting the defendant, he told her that the plaintiff had tried to injure him all he could, and that the defendant would, therefore, try to hear all charged against him. James Little testified that the defendant came before the presbytery, who asked him if he came as an accuser, and the defendant said he was appointed by a committee. The witness did not know that the congregation appointed a committee in reference to this matter.

The defendant gave in evidence by one Hughes, that he was present and heard the conversation alluded to by Fisher at the hatter's shop, and that the defendant then said that he had heard that the plaintiff was seen by the board fence with her, and that a man told him that he would swear that he saw him there. Other witnesses were produced by the defendant contradicting the evidence of the plaintiff as to the statement made in the hatter's shop. The defendant further gave in evidence, by one David Kelly, that an investigation regarding the charge was made, and a committee appointed to examine the matter, and that he, the defendant, did what his duty and the rules of the church required, namely, present written charges based on the various reports concerning the plaintiff. The defendant then offered to prove that certain persons had declared that plaintiff was caught with Mrs. Cain by the board fence,

and had connection with her, and also that the plaintiff was great with Mrs. Cain previous to the speaking of the words charged against the defendant, and that these persons had sworn to the same before the presbytery, and were now ready to testify to the same; but this evidence was refused by the court. He then offered to prove that when he went before the presbytery, he took Ann Cave as a witness to prove his charges, and that she swore to the fact then, and was ready to do so now. The court consented that Ann Cave might be examined; that she was sworn as a witness before the presbytery, but not further. The defendant then offered to prove that Ann Cave had informed Jacob De Groat of the facts which defendant had offered to establish, and that this information was the cause of the meeting of the presbytery. This the court overruled. The defendant next offered to prove that long before the meeting of the sessions, and before the words were spoken by the defendant, the plaintiff had acknowledged that these reports were in existence, and originated in the family of the plaintiff, which was also overruled.

The defendant excepted to these rulings of the court, and after verdict and judgment for the plaintiff, brought a writ of error to this court.

Ogden and Maxwell, for the plaintiff in error, contended that the evidence should have been admitted as showing a want of malice, and in mitigation of damages; that the plaintiff below had given in evidence, by way of aggravation, words not charged in the declaration, and defendant should be allowed to prove them true under the general issue: Bull. 10.

Williamson and Stockton, for the defendant in error, contended that the truth could not be given in evidence, even in mitigation of damages, under the general issue: Bull. 9, 10; and that evidence in justification going to the defense cannot be introduced under the cover of evidence in mitigation of damages; that the fact that the slander was reported in the neighborhood was no excuse to the defendant below: 5 Com. Dig. 605; Pleader, 2 L. 7: Sayer's R. 266; *Northampton's case*, 12 Coke, 133.

KIRKPATRICK, C. J. This is an action of slander. The defendant pleaded not guilty; and gave a notice of particulars, in order to let in the special case. This notice, however, is so unskillfully drawn, that all benefit under it was waived at the trial by the defendant's counsel, and, I think, rightly so. The cause, therefore, stood simply upon the plea of not guilty. The de-

fendant, under this plea at the trial, offered several matters in evidence, which were overruled by the court, and a bill of exceptions was thereupon taken, and upon error brought in this court. The question is now upon the matter contained in that bill. The substance of the objections to the proceedings of the court below, drawn from this bill, is: 1. That they overruled evidence offered by the defendant below to prove that he only repeated what had been said by others; and 2. That they admitted evidence of what passed before a certain presbytery of the church, in part against the defendant; but overruled evidence of what passed in the same church judicatory in his favor.

As to the last of these it does not seem to me to be grounded in the record. It is true that some of the witnesses detailed certain things which happened before the church judicatory, but there was no objection raised to this by the defendant below. As soon as exception is taken to the detailing of the proceedings, then the court overrule it, and, I think, rightly.

The cause will turn, therefore, according to my view of it, upon the single question whether upon not guilty in an action for words the defendant can give in evidence, either in verification of the plea or in mitigation of damages, that he only repeated a current report, or that certain other persons had publicly declared the same thing. And upon this question the resolution of the court in *Northampton's case*, 12 Coke, 134, seems to me to have laid down the principle which has been followed ever since. In one view of the subject this may appear to be a rigid rule that he who repeats shall be subject to the same damages as he who invents and propagates a malicious slander; yet when it is considered that the action is not for the punishment of the slanderer, but for the remuneration of the injured, I think it will change its aspect. If A. utters to the world a slander which deprives me of my good name and reputation, and even of the means of obtaining a livelihood, does it at all make up my loss to tell me he had the story from others? I think not. Be the reason of the rule, however, as it may, as far as I have had opportunity to trace the course of decisions upon the question, they seem to me uniformly to have recognized this principle, that on not guilty in action for words common fame cannot be given in evidence. I believe there is wisdom in the rule, and if it were otherwise I cannot change it. I am of opinion, therefore, that the judgment be affirmed.

ROSSELL, J. It is assigned for error in this cause that the court of common pleas for the county of Somerset admitted illegal and refused to admit legal testimony. On the fullest consideration of the subject I have been able to give it, I am of opinion that no evidence was admitted by the court below but what is warranted by law in suits of this nature: 1. On the refusal of testimony by the court it is alleged that the defendant offered to prove the truth of the words charged in the declaration, which testimony was overruled. I take it to be indisputable law ever since the decision of the court in the case of *Underwood v. Sparks*, as laid down by Chief Justice Lee, in *Strange*, 1200, that the truth of the words in actions of slander shall not be given in evidence on a plea of not guilty;

2. That the defendant offered to prove by A. Cave that she had informed Esquire De Groat of the facts proved, and that this was the cause of the meeting of the presbytery, which was overruled;

3. That the defendant below offered to prove the confession of the plaintiff himself, "that those reports were in existence, and that they originated in the family of the said David Barkley." This was also overruled.

In support of all these decisions of the court of common pleas, it has been urged by the counsel for Mr. Barkley, that the action was not brought for words spoken as a report, but as a fact; that the defendant, at the time of speaking the words, should have given his author, or he is precluded from doing so afterward; that every person is answerable for the slander he reports of another; and that common fame of the truth of the report shall not be inquired into, for it might have originated with the defendant, and he would in that case be permitted to shelter himself under his own guilt and cunning, and avoid the punishment he justly deserved. In confirmation of these ideas, 5 Comy. 605, Sawyer's Rep. 266, and 12 Coke, 134, have been cited. The reference to Comyns is under title pleader, and the author, in giving directions on that head, says: "So it is no plea that the plaintiff was not of good fame, or that there was a common fame that he was guilty." But I confess I cannot understand this authority as precluding the defendant from giving in evidence circumstances to palliate his offense, and in mitigation of damages. As much of the case cited from Coke as is applicable to the present is briefly this: The attorney-general informed against six persons therein named for "speaking and publishing divers false and horrible scandals against

the Earl of Northampton." At the hearing of this cause, eleven judges were present; and it was then resolved "that in a private action for slander of a common person, if J. S. published generally without a certain author that J. G. was a traitor or a thief, an action surely lieth against him, for that he had not given to the party grieved any cause of action against any but himself, who published the words." For the publication of the scandal aforesaid all the defendants in this cause were punished by fine and imprisonment. But Goodrick and Ingram (two of the six) were fined the most, for that Goodrick had no authority for the words concerning the cinque ports; nor could Ingram find any authority to vouch that he had heard them; therefore, it was taken as a fiction of his own. This authority, then, both in reason and in fact, makes directly against the decision of the court of common pleas. Four of the defendants were permitted to show that they had heard from others the reports they circulated, and although this was not, in the opinion of any of the eleven judges, a complete justification, it was considered by them as a mitigation of the offense; and they, therefore, were not punished so severely as Goodrick and Ingram, who could make no such proof, and who were supposed to have raised the report themselves.

In the case now before us, the defendant below did, in his conversation (as stated in the declaration with Jeremiah Fisher, the principal witness on the part of the plaintiff), give Howell's boys as his authority, and in support of his allegations. Robert Hughes, another witness, also states that at the conversation alluded to by Fisher, he was present, and that the defendant said a man told him he would swear he had seen the plaintiff by the board fence, etc., and thinks he mentioned Mr. Bush. The defendant is not, therefore, strictly within the reason of the rule laid down in *Northampton's case*, more especially if he could make it appear that the plaintiff knew those reports were in circulation, and the person with whom they originated. But he is completely within the rule of distinction by which the judges were guided; that if he could prove he was not the original publisher of the scandal for which he was prosecuted, his offense, and consequently his punishment, would be lessened.

In Buller's *Nisi Prius*, page 9, it is stated in the case of *Smith v. Richardson*, that upon a plea of not guilty, the defendant may give in evidence the manner and occasion of speaking the words in mitigation; so he may give in evidence a confession of

the plaintiff that he was an accessory. For, says the authority, he could not plead this in bar. Here, then, the general rule appears to be, that if the defendant is in possession of any facts which could be properly pleaded in bar, he shall set them forth in his pleadings, that the plaintiff may be enabled to give contrary proof, or to reply several things of which he would lose the benefit on the general issue. But where any circumstances attend the slander, which go to lessen the degree of malice supposed to have actuated the defendant in the propagation of it, but which do not amount to a complete justification, and cannot, therefore, be pleaded in bar, he is allowed to give them in evidence on the general issue in mitigation, or otherwise he would lose all the benefits which ought to arise from any extenuating circumstances. It cannot be contended that it would have been a plea in bar to the present action for the defendant to have proved that he heard from another the scandal he had reported; for, in the book last cited, page 10, in an action brought by a master of a ship against a merchant, for saying his vessel was seized and he put in prison for running corn, it was held by Lord Chief Justice Lee, that the proof of the defendant's having heard it read out of a letter was no justification, but that every person was answerable for the slander he reported; but he might, according to the rule above stated, and probably did (I say probably, for we have not the whole case) give it in mitigation.

The gist of an action of slander, for words in themselves actionable, is the malice which produced them; take away this, and the suit is not sustainable in any shape. It rationally follows, then, that as there are degrees of malice, the punishment inflicted on the slanderer should be in just proportion to the degree proved; and as it is always allowed in actions of this nature, for the plaintiff to give in evidence that the slander was repeated, to show it was malicious, and also that the defendant had used other expressions of ill will, should not the defendant then, on every principle of justice, be permitted, if he can, to lessen the appearance of malice thus raised up, and to prove that although he had heard and reported slanders he was unable to justify, yet of the principal and additional guilt of having invented them, he was entirely innocent. Great inconvenience might arise from a contrary doctrine. An unprincipled man might cause scandalous reports, yet untrue, to be circulated respecting himself, and on a prosecution for repeating them, should the defendant be precluded from giving in evidence that

he heard them from others, or that they originated with the friend, or in the family of the plaintiff, in mitigation, the villainy of the plaintiff would be completely successful in a verdict for damages. To show that the defendant, in the cause before us, was actuated by malice and ill-will, other conversations than those laid in the declaration were permitted to be given in evidence on the part of the plaintiff, viz: those with John Harriot and Nancy Sebring. I am, then, clearly of opinion, that the defendant, before a tribunal not limited in the damages they might find against him, but by the sum named by the prosecutor, had a legal right to show the circumstances under which the words were spoken, and to exculpate himself, in the view of his country, from the suspicion of having invented so scandalous a tale. He could not do this more effectually than by proving the slander originated in the family of the plaintiff. The court below refused to hear this testimony on this head; and, in so doing, I conceive their decision was unlawful. Therefore, let the judgment be reversed.

PENNINGTON, J. The question for the determination of this court is, whether the common pleas of Somerset did not commit error in rejecting testimony offered by the plaintiff in error, the defendant below. The declaration charged the defendant below with maliciously publishing certain slanderous words of the plaintiff relative to an adulterous intercourse with a certain Mrs. Cain. The defendant pleads to all the counts in the declaration the general issue. On the trial it appeared, that certain reports had been in circulation in the congregation relative to the conduct of the plaintiff, who was the minister, in respect to Mrs. Cain; that the defendant was one of the congregation; that the sessions of the church had been convened on the occasion, and an inquiry had been set on foot; that three weeks after the meeting of the sessions, Jeremiah Fisher, a witness on the part of the plaintiff, and the only one that proved any of the words contained in the declaration, swore that he met the defendant, Dr. Cook, at a hatter's shop, when a conversation took place on the subject, and that the defendant said, that it was now said that the plaintiff below had been ketched in the fact of being with Mrs. Cain at the board fence; the witness asking how it could be proved. The defendant answered, by Howell's boys. The same witness testifies to two facts, that go to show doubts as to his correctness, in respect to the positive asseveration of the defendant; for he immediately says, that the defendant observed that it was a scandalous thing for a minister if

true. The introductory words, it was now said, go to the same point. A witness present at the same conversation says, that the defendant spoke of it as what he had heard; other witnesses were called who testified that the first witness, Fisher, had said at other times that the defendant did not speak positively, but that it was so said and reported. The defendant then offered to prove by a witness that it was said and reported by other persons, before the words spoken by him; and that witnesses had been examined before the presbytery, who had sworn to the facts; and that the plaintiff himself had acknowledged there was such a report in circulation; and that it originated in his own family. So far, at least, as the testimony went to show, that there was such a report in circulation, and that the story originating in the family of the plaintiff, I think the court erred in not receiving the testimony. The *quo animo* with which the words were spoken was in the point in issue, as malice constitutes the gist of the action. It appears to me that the testimony was proper, to show with what temper of mind the defendant spoke the words; whether from a malicious design to injure the plaintiff, or from a laudable motive to preserve the purity of character, so essentially requisite to a person exercising the functions of the plaintiff; or from mere inadvertency; or even if it should appear to the jury the defendant had pursued the inquiry with so much zeal as to indicate an evil intent, yet if it should appear that he did not give rise to the slander, but only repeated what he heard from others, giving credit to it as coming from the plaintiff's own family, and the more especially, if it should be found that this was done in the course of prosecuting the plaintiff before the sessions or presbytery, it certainly might and ought to go in mitigation of damages.

I am aware that I am treading on what some may think questionable ground; that there are some *dicta* in the books, and opinions out of them, that look another way. This, however, ought not to deter me from the investigation of a subject of vast importance to society, as it affects in a delicate point the public justice of the country. It is no doubt a rule of law, that what may be pleaded in justification cannot be given in evidence on the general issue of not guilty; that a defendant shall not indirectly and by surprise set up a defense which he might and ought to have apprised his adversary of by plea. This is a rule founded on the nicety of special pleading, contrived to narrow the point in controversy to a single and simple point; but it is confined to those cases where the matter offered

in evidence would of itself be a justification, and might be pleaded; and not where it is merely evidence of a fact which, if true, only goes to show that the defendant was not guilty, or in mitigation of damages.

Supposing one of my neighbors, for instance the parson of the parish, should call at my house and very gravely inform me that one of our neighbors had been found out and fully detected in the commission of some scandalous offense, and detail the circumstances both of the commission of the offense and of the detection; that other persons of good credit were to drop in and relate the same story, so that I should fully believe that the facts were not only true, but that they were public; and that in conversation afterward with some other person I was to mention that there was such a report in circulation, without thinking it necessary to name the person from whom I had it, and it should turn out afterward to be a mistake, that it was another person resembling the one spoken of in name, or in other circumstances which had led to the error; if the party should think proper to bring an action against me, I could not plead that I had it from other persons, and that it was a general report in the neighborhood, but I must plead the general issue that I was not guilty of a malicious slander. Reason and justice would, however, say that I might give in evidence the whole transaction, the manner and occasion of speaking the words; that if it would not wholly excuse me, it might at least go in extenuation of the injury; and I have not been able to discover any adjudicated case to the contrary. The *dictum* cited from Com. Dig. goes no further than to prohibit this matter from being pleaded in bar to the action. The sayings of the judges in *Northampton's case*, 12 Coke, which the reporter calls a resolve, goes no further; it only says that in such case an action on the case may be maintained, that is, its having been reported by others cannot be pleaded in bar.

The reason I apprehend to be, that although a person reporting what he hath heard from another, may do it from laudable motives or innocent views, yet he may also do it from vile and bad motives; he may not believe the report himself, and yet circulate it from malicious views; and this is a proper subject for the consideration and determination of the jury: *Northampton's case*, before mentioned and which was cited by the counsel for the plaintiff below, in part recognizes this distinction, and as this is considered a leading case on this subject, it merits some attention. It is proper to observe, that this is a star

chamber case, the proceedings in which were not by the rules and course of the common law; the case was a criminal one, in favor, as the case states, of one of the grandees and peers of the realm, a principal officer of state, high in the confidence of the king, the information *ore tenus*, and the examination summary, and by interrogatories put to the persons accused. In fact there were no pleadings; a jury never set foot in this chamber. One Goodrick was charged by the attorney-general with publishing certain horrible lies of the Earl of Northampton; Goodrick, being examined, acknowledged speaking the words charged against him, but alleged, by way of excuse, that he had them from one Cox. Even this high prerogative court did not tell him it is of no importance from whom you had the report, you are the slanderer, and must take the whole on yourself; but they examined Cox, who acknowledged that he told Goodrick some part of what he reported, and that he had that part from one Lake, who, being examined, said he had it from another; and in this way this court traced it through several persons to one Ingram, who said he had it from some English fugitives in foreign parts. This was considered as a fiction, and he found to be the author. It is true, the court punished all these persons; but they made a distinction between Goodrick, who gave no author for part of what he said, and Ingram, who could not give a satisfactory one for the remainder, and the intermediate persons through whose hands the report had passed, whom they punished less. This certainly went in mitigation; they were not punished as principals; and it is also to be recollected, that they did not relate it as a report, but as a fact. I cannot, therefore, see anything in this case that impeaches the doctrine which I have here advanced. All the circumstances connected with the words should go fully and fairly to the jury, who must judge from them of the guilt or innocence of the defendant; and in case they find him blameable, to assess such damages as the more or less aggravated circumstances of the case will justify. Justice and reason calls for this rule; and the law, as I apprehend, does not deny it; nor can I perceive what inconvenience can result from it. An intelligent court will always instruct the jury in what light to apply the testimony; distinguishing between that which goes to the point in issue, and that which goes in mitigation or aggravation. Is it not as reasonable to mitigate as to aggravate? Our law does not delight in exposing the dark side of the human character; it seeks truth; it is not vindictive, it is merely just. It is too dignified and enlightened

to put on the same footing the vile inventor, fabricator and publisher of a malignant slander, and him who inadvertently repeats what is already in circulation.

I am, therefore, of opinion that the judgment be reversed.

Judgment reversed.

LOT v. THOMAS.

[1 PARMISTON, 407.]

COVENANT RUNNING WITH LAND.—A covenant of seisin does not run with the land.

ACTION ON COVENANT OF SEISIN.—To maintain an action on the covenant of seisin it is not necessary to prove an eviction or an offer to restore the possession.

SAME—ESTOPPEL.—In this action the plaintiff is not estopped by his own mortgage of the land subsequent to the covenant, or a sale by the sheriff, to say that the defendant, the covenantor, had no title.

Action of covenant. It appears that on the first of February, 1797, the defendant conveyed to the plaintiff, in fee-simple, a certain tract of land, by deed, covenanting that defendant was the sole owner of the premises, and that he had in himself full right and absolute power and authority to grant, bargain, and sell the same. The plaintiff assigned the breach in the words of the covenant. The defendant pleaded: 1. That he was the sole owner, etc., and issue thereon; 2. That the plaintiff on the second day of February, 1797, the day after the execution of the first deed, conveyed, by deed, the same premises back to the defendant; 3. That the premises were afterward sold at sheriff's sale, at the suit of the defendant, and purchased by him.

The plaintiff prayed oyer of the condition of the second conveyance, from which it appeared that the conveyance was by way of mortgage; and replied that the sum for which judgment had been obtained, and the land sold, was the same sum secured by the mortgage; to which there was a demurrer and joinder.

Williamson and Ogden, for the defendant, contended that covenants of seisin, warranty, and further assurance attached to the land and pass with it: 3 Cro. 503; 3 Comy. 261, 262; 1 Cro. 373; Shep. 194; 1 Swift, 304; 3 T. R. 401. That the covenant of seisin passed with the mortgage to the defendant, and being out of the plaintiff he cannot sustain the action; and he

is also estopped by the sheriff's sale from saying he had no title: 2 Blac. Com. 395; Cowp. 601.

Stockton, for the plaintiff, contended that a mortgage in New Jersey was merely a pledge; that the mortgagor was the owner of the land; that the covenant of seisin was a personal covenant and did not pass with the land; that it was owing to the defect in the title that the land did not sell for a better price at the sheriff's sale; and that although the estate has been determined an action may be brought for breaches of covenants occurring before the determination: 2 Bacon, 74.

KIRKPATRICK, C. J., was of opinion that the defendant ought to have a judgment.

PENNINGTON, J. It is contended by the counsel for the defendant that a covenant of seisin is a real covenant attendant on the land and passes with it, and, therefore, the right of action arising on the breach of covenant, in this case, had passed out of the plaintiff with the land before the action brought; and they liken the present case to a covenant of warranty, and a covenant of further assurance. At the time of the argument I confess I was struck with the resemblance of the cases, and was a little surprised that no book case was produced to warrant the opinion; but on a more mature consideration of this case I am fully satisfied that there is no likeness in the cases. A covenant to run with the land must, from its nature, have a continuance, and is made in a contemplation of, and to guard against some event which may fall out or happen in future, or to provide for some act to be performed thereafter that respects the land. A covenant of warranty is of this nature, to secure and defend the grantee against a future eviction; so, also, is a covenant for further assurance, an agreement to do a future act—to execute and deliver new conveyances in furtherance of the title. But a covenant of ownership or seisin is a present act, and if the covenantor hath not title or is not seised, the covenant is broken as soon as made; it is so laid down in *Shep. Touchstone*, 170; the right of action immediately vests in the covenantee, and does not go with the land to his assignees, either grantee or feoffee. In the present case the assignees of the covenantee are not mentioned in the covenant, as far as the contents of that instrument are disclosed by the record. However, if they were named I do not see that it could make any difference, for even if the covenant run with the land they could not have an action for a breach before their time. It would, in fact, be assigning

a chose in action, an act interdicted by the common law. If this covenant is, however, to be assimilated to a warranty, it is of some importance; as it is expressly laid down by Sheppard, 198, that those who are not named such as heirs and assigns shall not have advantage of warranty.

It is said, however, by the counsel for the defendant, that an action for a breach of covenant of seisin cannot be maintained unless the purchaser hath been evicted or hath offered to restore the possession of the land. I cannot find a single case or even *dictum* to justify this extraordinary proposition, and every day's practice is at variance with it; it hath been ruled over and over again in cases arising on these actions of seisin, that an assignment of the breach in the words of the covenant is sufficient. If an eviction or an offer to restore was an essential requisite to the maintenance of the action, these essential points should be averred in the declaration; for no rule of pleading is more fully established or on better reason, than that every declaration must contain a complete cause of action. Again it is said that the plaintiff is estopped both by the mortgage deed and the sale and conveyance by the sheriff, to say that the defendant had no title. If this proposition is correct, great frauds and injustice would be sanctioned by our law. A. conveys to B. a tract of land in the deed for which he covenants that he is lawful owner and hath full power to sell. B., not being able at the time to pay all the purchase money, and believing A. to have a good title, mortgages the same land to A. to secure the balance, and afterward pays off the mortgage; it turns out, however, that A. had no title to the land, and B. is evicted and turned out of possession and brings the action on the covenant in his deed, but is estopped by the mortgage to say that A. was not owner or had not full power to sell, and thus by a kind of legal leger-demain B. is tricked out of his money. If this doctrine is true, Lord Coke was not only justifiable in saying that estoppels were odious in law, but he might have gone further and added that they were also detestable.

Happily, however, our law is not chargeable with any such absurdity. It is laid down by Lord Coke that every estoppel, because it concludeth a man to allege the truth must be certain to every intent, and not to be taken by argument or inference: Coke Lit. 352, 356. If we apply this reasonable rule of the common law so correctly expressed by his lordship to the case in question, the proposition of the defendant's counsel must go to the wall. The plaintiff in his mortgage deed does not say

that the defendant was sole owner of the premises and had full right and absolute power and authority to grant, bargain and sell the same. The most that can be drawn from the mortgage deed is that the plaintiff impliedly said, that he himself was owner, and had power and authority to bargain and sell at the time of executing the mortgage deed, or rather that he should not be permitted to say the contrary; from which it is inferred by argument and deduction, that having purchased of the defendant the day before, he recognized and acknowledged his title. But even this argument and inference is not conclusive; the plaintiff might have purchased or otherwise acquired the legal title in the meantime, and although he may not be permitted to say that he himself had no title at the time he executed the mortgage deed, yet he may and ought to be permitted to say that the defendant had no title when he executed this deed to the plaintiff. Even a recital in a deed doth not amount to an estoppel, because it is no direct affirmation: Coke Lit. 352, 356.

The conveyance by the sheriff is not only liable to the foregoing objections, as it respects the doctrine of estoppels, but to still greater, arising from the nature of the conveyance; although a man is in certain cases estopped by his own act to allege the truth, yet he shall not be estopped by the act of law. The principle upon which the doctrine of estoppel rests, is that a man shall not be permitted to allege anything contrary to what he hath before solemnly done. It is true, the sale by the sheriff is to have the same effect as his act, so far as it goes to make a title; but it is not his act so as to estop him from alleging the truth on any point whatever. He may allege a collusion between the sheriff and the purchaser; but he would be estopped to allege a collusion between himself and the purchaser.

On the whole, I am of opinion that neither the second nor third plea can be supported, and that the plaintiff must have judgment.

BOUDNOT, J., concurred in opinion with **PENNINGTON, J.**

Judgment for the plaintiff.

CASES
IN THE
SUPREME COURT
OF
PENNSYLVANIA.

HARE v. FURY.

[3 YEATES, 13.]

RECOVERY OF MESNE PROFITS AGAINST JOINT-TENANT.—Joint-tenants or tenants in common recovering in ejectment are bound to obtain possession under the proper writ or otherwise; and in case they neglect to do so, they will be limited to a recovery of mesne profits to a reasonable time after judgment, which in this case was held to be a month.

ACTION in trespass for mesne profits of two-fifth parts of two parcels of land, from the tenth of May, 1780, to the tenth of September, 1795. The defendant pleaded not guilty, and the statute of limitations. The plaintiff produced the record of an ejectment brought by his nominal lessee against the defendant, wherein a demise was laid on the tenth of June, 1788, for seven years. The suit had been removed into the supreme court, and on a *distringas* being issued for a jury on the ninth of May, 1791, the defendant admitted on record that the lessor of the plaintiff was entitled to two-fifths of the land, and consented that judgment should be entered for him for that proportion of the lands, the plaintiff paying costs.

The writ in the present action was issued on the tenth of September, 1795, and the plaintiff admitted he was barred by the statute of limitations from recovering prior to the tenth of September, 1789, but contended that he was entitled to mesne profits from that period until the time of his coming into possession shortly before the commencement of this action. A writ of possession had been taken out in the ejectment, returnable to January term, 1792, but it did not appear to have been executed.

T. Ross and Hemphill, for plaintiff.

McKean and Porter, for defendant.

The counsel for defendant objected that the plaintiff could not take advantage of his own laches, for he had power to compel the defendant to let him into possession; and if he has chosen to delay his appropriate remedy, he should not take the profits of his partner's labors in the land.

There is no difference between a verdict in ejectment and a judgment by default or by confession: 2 Burr. 668. Mesne profits can be recovered only between the time of demise and recovery in ejectment: 15 Vin. 395, pl. 4; 1 Lil. Pr. Reg. 596; 1 Dall. 172.

On the part of the plaintiff it was argued that a tenant in common might clearly support trespass for mesne profits: 2 Wils. 115; for his right to compensation must be co-extensive with the adverse possession of his companion. The recovery in the case cited from Lilly must refer to an execution executed, it cannot be in reference to the verdict: 2 Wils. 121; because injustice would be done in many cases where judgments are not rendered for several months afterward. Where judgment is against the tenant in possession, and trespass is brought against him, it is sufficient to produce the judgment, without proving the writ of execution executed, because by entering into the common rule, the defendant is estopped both as to the lessor and lessee; *aliter*, where judgment is rendered against the casual ejector: 1 Str. 5; Bull. 87.

By Court, SHIPEN, C. J., and YEATES, J. After a recovery in ejectment, the general rule is, that the plaintiff may recover mesne profits against the defendant for such length of time as he can prove him to have been in possession; if he goes beyond the time laid in the demise, the defendant may controvert his title, or may plead the statute of limitations, if the plaintiff attempts going back above six years: Bull. 87, 88. But a natural distinction presents itself in the case of one joint-tenant, or tenant in common, recovering the possession against their partners on an actual ouster. The defendants in such instances hold undivided interests, and cannot be compelled to relinquish the entire possession. It was incumbent, therefore, on the plaintiff to obtain possession under the proper writ, or otherwise, in a reasonable time after judgment in the ejectment; and if he is remiss herein for years, he shall not charge the defendant as a trespasser. Here the judgment was absolute at nisi

prius on the ninth of May, 1791, and allowing one month thereafter as a reasonable time for obtaining the service of a *habere facias possessionem*, the plaintiff is entitled to mesne profits from the tenth of September, 1789, to the ninth of June, 1791, being one and three-quarter years, and for no longer space of time.

Citing this case, Freeman on Co-tenancy, sec. 303, says: "That an action for trespass for mesne profits may be maintained by one co-tenant against another after and as a necessary consequence of a judgment in ejectment, has long been established both in England and America." But in this case, the question was not raised; it was assumed as a correct principle, on which the decision rested.

In *Chambers v. Lapsley*, 7 Pa. St. 25, Coulter, J., referring to this case, says: "If the plaintiff permits the defendant to remain an unreasonable time in possession, without taking out a *habere facias possessionem*, he will not be permitted to convert the defendant into a trespasser against his will."

NORRIS v. INSURANCE CO. OF NORTH AMERICA.

[3 YEATES, 84.]

EVIDENCE TO CONTROL POLICY OF INSURANCE.—A policy of insurance may be explained and controlled by the written application to make the insurance.

RISK ASSUMED BY INSURER.—To subject an insurer to a loss, the risk run must correspond with that understood and intended to be run at the time of subscribing the policy.

INSURER BOUND BY USAGE.—An insurer is bound to inform himself of a general and well established usage of trade.

COVENANT on a policy of insurance subscribed by the defendant upon all goods laden, or to be laden, on board the brig American, at and from Port de Paix to Philadelphia, with permission to touch at one or other French port on the north side of the island of Hispaniola, beginning the adventure on the said lawful goods and merchandises from and immediately following the loading thereof on board of said vessel at Port de Paix. The policy was subscribed on the ninth of March, 1797, for twelve thousand dollars, at a premium of eight per cent., and if no loss happened two per cent., to be returned if the vessel proceeds direct from Port de Paix to Philadelphia. In the policy, it was expressly stated that the insurance was upon "goods and cash."

The written application of the plaintiffs was: "Insure twelve thousand dollars property on board the brig American, Captain Thomas Town, Jun., at and from Port de Paix to Philadel-

phia." It appeared by a witness that the plaintiffs desired to have cash on board the vessel, then understood to be at Port de Paix, insured, and that they were informed at the office that this would not be the case unless specie was particularly mentioned.

From two protests of the captain, it appeared by the first made at Port de Paix that he sailed from Philadelphia on the thirty-first October, 1796, clearing for St. Bartholemew's, but bound to Marigalante, where he arrived eighteenth November, and was refused permission to trade. Next day he sailed, and on the twentieth arrived at Port Liberté, where he sold his cargo, and took on board coffee, cotton and sugar. Thence he went to St. Thomas, arriving fifth January, 1797, and sold his cargo for eighteen thousand two hundred and forty-seven dollars. He there purchased ninety-eight barrels of flour, and on twenty-second January sailed for Cape Francois, but being pursued by English ships, he was forced on the twenty-sixth into Port de Paix. On the following day a guard was placed on board, and his papers seized and sent to Cape Francois, whither he was obliged to go to plead his cause; and on the thirty-first, his papers being found in good order, were returned. On his return to Port de Paix, the guard was found on board, and he was informed by the administration that the money should be lodged in the treasury, and he should receive payment in coffee. On the fourth February, the officers of the administration forced open his cabin door, and took away the specie, consisting of fifteen thousand four hundred and forty-nine dollars, promising to deliver him coffee in return.

The captain's second protest, at Philadelphia, May 29, 1797, substantially enumerated the preceding facts; but he then stated that a few days after the specie was taken, the ninety-eight barrels of flour were forcibly seized, and coffee promised him in payment.

It was proved to have been the general usage of the French West India islands previous to, and since the American revolution, that when foreign vessels arrived in their ports, a guard was immediately sent on board, who took the ship's papers for inspection, which, in many instances, were not returned to the captain until he had delivered to the government officers the goods they required, which were usually paid for in colonial produce. This usage was known generally by all trading with these islands. The deposition of Captain McEver was read in evidence, in which he stated that on the twenty-eighth January, 1797,

he saw Captain Town at Cape Francois, who told him that he had sixteen thousand dollars, one hundred barrels of flour, and some dry goods on board the brig American at Port de Paix, and that the administration had taken charge of his vessel and papers, but that his papers had been returned to him. McEver arrived in Philadelphia on the twentieth February, 1797, and had informed the plaintiffs of what he knew; but these particulars were not communicated to the defendant previous to subscribing the policy. It was maintained by the plaintiffs that the defendants had received their premium of nine hundred and sixty dollars, after they disputed the loss; but on examination it appeared that a note was given for the premium, which fell due on the twelfth June, and it was paid at maturity.

The defendants pleaded covenants performed.

Ingersoll, E. Tilghman and Moylan, for the defendants (having the affirmative, and, therefore, the right to begin, as the court held), put their defense on two grounds: 1. That the object insured never existed; 2. Improper concealment of facts known only to the insured. The terms of the policy clearly show that the insurance was intended for the property on the return voyage, and therefore the policy did not take effect until the goods were laden at Port de Paix. An insurance on goods "at and from" a place, means from beginning to load them: *Wesket*, 24.

As to the point of concealment, it was a material circumstance, and it not having been communicated to the insurer, the policy is thereby vitiated; and it is no matter whether the neglect arose from accident or design: *Park*, 195. The case of the captain being restricted to one of three routes from one port to another, shows to what extent this doctrine has been carried: 7 T. R. 162.

Rawle and Wells, for the plaintiffs. If, after a call for the loss, the defendants demanded and received the premium, they thereby waive all objections to the policy on the ground of their running no risk. It is the risk run which entitles underwriters to their premiums; and in every case where a policy has been vacated on the ground of the risk not having attached, except in case of actual fraud, the premium must be returned. Independent of this, it is contended that though the outward bound voyage was made to Marigalante, yet the captain not being allowed liberty to trade there, it terminated at Guadaloupe, where he disposed of his cargo and received the proceeds on

board. From this place the homeward voyage began. The chief object of the plaintiff was to insure the cash, which was particularly mentioned in the policy. Their written instructions to the office were: "Insure twelve thousand dollars, property on board the brig American, at and from Port de Paix," etc. If the wording of the policy is defective, the intention of the parties may be collected from the application, and it shall control the formal expressions. Thus, in *Atk.* 548, the terms "at and from" in a policy were corrected by the label or minutes of the agreement where the policy differed from them. The *strictum jus* or *apex juris* is not to be applied to such commercial instruments, but according to the usual course of trade, and for the benefit of the party insured: *Park*, 43: 1 *Burr.* 348.

As to the concealment alleged, the insured are not bound to communicate what the insurers are bound to know. The course of trade must govern for the benefit of the insured, and the insurers must inform themselves of a usage of trade: 1 *Burr.* 348; *Doug.* 492; *Park.* 220.

SHIPPEN, C. J., delivered the charge of the court. The assertions of the plaintiffs that the defendants demanded and received the premium of insurance, after the demand made for the loss, seems to be fully obviated by the defendants' statement.

The words of the policy are explicit and clear in favor of defendants, if considered merely by themselves independent of the written instructions or order to make insurance. In the first part of the policy, the voyage is described "at and from Port de Paix to Philadelphia, with liberty to touch," etc.; but in the latter part thereof, according to the constant form, it points out what shall be called the risk, and the words there are (1 *Atk.* 546): "Beginning the adventure on the said lawful goods and merchandises from and immediately following the loading thereof on board of said vessel at Port de Paix." But the order runs thus: "Insure twelve thousand dollars, property on board the brig American, at and from Port de Paix to Philadelphia." This memorandum shows the intention of the plaintiffs to have been to insure the articles on board at the time of the receipt of their last intelligence, however injudicious the measure might have been. This will control and explain the expressions in the formal policy, and the mistake of the clerk therein shall be rectified thereby, according to the authority cited: 1 *Atk.* 547. It appears to have been the capital object of the plaintiffs to insure the specie then laden in the brig at Port de Paix, and

they are so mindful thereof, that they insist on the word cash being inserted in the policy. As to the money, it certainly was not material to the insurers where it was shipped, though it might be otherwise as to the flour and dry goods on account of average loss, as they might have possibly suffered in the previous voyage from St. Thomas. The defendants certainly knew of cash being on board, and also of other merchandise, though they may not have been informed of the articles. The present exception appears to me a technical one, and if there was nothing else in the case, ought not to prevent the recovery of the plaintiffs.

On the head of concealment, it becomes the duty of the jury to ascertain the facts in the first instance. Hence arises the law. Be it with them, therefore, to determine under all the circumstances of the case, whether the events which took place as to the brig at Port de Paix, were within the usage and course of trade of the French part of the island of St. Domingo. If they shall be of opinion, that everything which happened there was consonant to and within the custom, then the want of communication of the particulars received from Captain McEver, cannot vitiate the policy, because all the cases abundantly prove that the underwriters were bound to inform themselves of such custom. But if they shall be fully persuaded that other circumstances occurred not warranted by nor within the custom, they are next to inquire of the materiality of those circumstances with respect to the subject of the present controversy, and whether the communication of those occurrences would have varied the risk in the judgment of the insurers. The verdict must necessarily, as to this last point, depend on the just inferences and conclusions which the jury draw from the whole mass of the testimony. To subject the corporation to a loss, the risk really run must correspond with the risk understood and intended to be run at the time of their president's subscription of the policy: 3 Burr. 1909.

Verdict for the plaintiff, the parties agreeing to liquidate the damages amicably.

In *Higginson v. Dall*, 13 Mass. 96, it was held that a written memorandum which was delivered to the insurance broker by the agent of the insured, but not inserted in the policy or annexed to it, was not admissible in evidence. Noticing this, and the principal case, Parsons on Marine Insurance, p. 114, says: "In the Massachusetts case just referred to, it is said that all proposals made, or conversations had, prior to the subscription of the policy are considered as waived if not inserted in the policy or con-

tained in a memorandum annexed to it, but it is very common in England as well as in this country for persons wishing insurance to offer to the insurers what is called a slip or application for insurance. And the cases we have already cited show that the question has frequently arisen whether this paper is admissible in evidence to show the intention of the parties. In the year 1800, it was decided in Pennsylvania that the policy of insurance may be not only explained but controlled by the written order for insurance. But in 1831, it was decided in New York by the court of errors, confirming the judgment of the supreme court, that the slip or application for insurance is inadmissible in evidence to show the intention of the parties in an action at law; that in such an action it is proper evidence only to show a misrepresentation while in equity it may be used to correct the policy. It should perhaps be remarked that in the beginning of this century courts of law in Pennsylvania not unfrequently exercised what would seem to be equity powers, and in the case referred to, the authority by which they sustain their ruling is an English equity case."

In *Pindar v. Resolute Fire Ins. Co.*, 47 N. Y. 114, a written application was made, inclosing a policy issued by another company, in which the plaintiff's stock was described as "such as is usually kept in country stores," with a request that a policy should be sent by mail, insuring the plaintiffs to the amount of three thousand dollars, in exactly similar terms. In reply a policy was sent omitting the descriptive words prescribed by the plaintiffs, and conditioned to be void if any extra-hazardous goods were kept in the store. A fire occurred, and the defendants relied on a breach of the condition in answer to a suit to recover on the policy. The plaintiff offered to prove that he had accepted the policy without reading it, under the impression it conformed to his written application. The court held that the omission of the insured to read the policy could not extend the liability of the insurers, it being an established rule that prior understandings and agreements were merged in the writing as finally executed. But it may be questioned whether this rule is sound; for sending the policy in response to the plaintiff's letter without explanation or modification, might reasonably give him the impression that the terms he proposed were accepted. See *Moliers v. Penn Fire Ins. Co.*, 5 Rawle, 346; *Susquehanna Ins. Co. v. Perrine*, 7 Watts & S. 348. In the former Sergeant, J., said: "A mistake in a policy may be rectified when it clearly appears from the label or other satisfactory evidence that it was reduced to writing in terms not conformable to the real intention of the parties." It is held that where one makes an application for a policy as the agent of a known or of an undisclosed principal, and the insurers accept the application and agree to prepare the policy, they are bound to draw the instrument so as to give effect to the agreement by describing the insurance as made in favor of the agent as such, or for the account of whom it may concern, and if they fail to do so, and the error is not discovered until after the policy is accepted, a bill may be filed to rectify the error: *Phoenix Ins. Co. v. Hoffheimer*, 46 Miss. 645; *Oliver v. Mutual Ins. Co.*, 2 Curtis, 277.

RESPUBLICA v. DAVIS.

[3 YEATES, 128.]

CONFESSION OF PRINCIPAL, EVIDENCE AGAINST SURETY.—In a suit against a surety on a recognizance for the good behavior of his principal, the confession of the latter that he had published certain libels may be given in evidence, but not the admissions of counsel for the principal in a former trial, nor can the verdict and judgment in the former trial between different parties be received in evidence against the surety.

PUBLICATION OF LIBEL.—Distributing papers containing libelous matter, and the fact of the clerk of the printer receiving payment for them, is evidence of the publication of the libel.

DEBT on a recognizance for one thousand dollars, conditioned for the good behavior of William Cobbet. *Plea nil debet.*

The action against Cobbet on his recognizance for two thousand dollars was tried at the last term, and a verdict and judgment were obtained thereon for the commonwealth.

McKean, attorney-general, offered in evidence the admission of Cobbet's counsel, on the former trial, that he had printed and published the various matters charged as libels. This was objected to and the evidence overruled; the court decreeing that the commonwealth might give in evidence in the present suit the confessions of Cobbet himself that he was the author or editor of the papers in question, but not the admissions of counsel in another cause between different parties.

The attorney-general then contended that the verdict against Cobbet and the judgment thereon should be received as evidence of the breach of his recognizance for good behavior. Where a verdict on an indictment is found on other evidence besides the party's own oath, there the conviction may be given in evidence by the party injured in a civil suit: *Gilb. L. E. 30*; and argued that the case was analogous to that of principal and accessory where it is unnecessary upon the trial of the accessory to enter into a detail of the evidence on which the conviction of the principal was founded: *Fost. 365*. As to a judgment against the principal being evidence against those claiming under him, *2 Str. 1109*, and *5 Burr. 2598*, are in point. The decree of a court of competent jurisdiction is conclusive evidence of matters tried collaterally: *Bull. 340*.

Lewis, for the defendant, contended that to make a former verdict evidence, it must have been between the same parties: *Gilb. L. E. 29*; their privies, or persons under whom they

claimed: 2 Str. 1189; 5 Burr. 2598. An accessory may controvert the guilt of his principal, notwithstanding the record of his conviction: Fost. 365; Leach's Cases, 263.

By COURT. The law laid down in Gilb. L. E. 30, has been contradicted: 1 Sid. 325; 12 Mod. 319, 339; Hardw. Cases, 298, 312; 4 Burr. 2255; 1 Str. 68; 2 Id. 856; 1 Ld. Raym. 750; Bull. 16, 229; Espin. 320, 736. How can it be ascertained what degree of credit was given to the party's own oath? Lord Gilbert received the information of the practice from Mr Phipps, but subjoins his own *quære*, after stating two objections to the doctrine. No record of conviction shall be given in evidence, except in those cases where the benefit of the verdict is mutual: Bull. 229. The general rule respecting verdicts being given in evidence has been correctly stated by the defendant's counsel. It is incumbent on the adverse party to show that the present case forms a just exception thereto. The former verdict was in a civil suit between different parties *res inter alios acta*; and "nothing can be more contrary to natural justice than that anybody should be injured by any determination that he was not at liberty to controvert:" Gilb. L. E. 29. The court reject the evidence.

The attorney-general then produced a bound volume of the Porcupine Gazette for 1797, which had been deposited behind the door of the library, and for which Cobbet's clerk had received payment.

Defendant's counsel objected that it ought to be shown that the papers were bought at Cobbet's shop, pamphlets purchased at the bookseller's being evidence of their publication: *Rex v. Almon*, 5 Burr. 2689.

By COURT. Pamphlets and books are usually bought at the shops; but newspapers are distributed at the houses of the subscribers. Cobbet is the printer of the paper which contains the libelous matter, and the common clerk received the money. They, thus circumstanced, must go to the jury, who will judge of their publication.

Verdict for the commonwealth.

Upon a writ of error to the high court of errors and appeals, judgment was affirmed.

SIMON v. BROWN.

[3 YEATES, 186.]

DEED IMPERFECTLY ACKNOWLEDGED, NO EVIDENCE OF NOTICE.—A deed recorded without a proper probate is no evidence of notice to subsequent purchasers.

EJECTMENT. The defendant offered in evidence a deed from the commissioners of Northumberland county, under their common seal, dated October 8, 1788, to one Thornburgh, by whom the land had been purchased at a sale thereof for the non-payment of state and county taxes, which deed was assigned by Thornburgh to one Drinker, twenty-eighth April, 1795.

The court refused to admit the deed in evidence, saying that such deeds were mere nullities, and had been overruled more than once.

The defendant claimed under an application entered in the name of Robert Semple, assigned to William Plunket on the third May, 1782. The plaintiff claimed under the same application assigned to Joseph Simon on the eighteenth of January, 1769. To prove a constructive notice to the defendant of this previous assignment to Simon, the certificate of its being recorded on the twenty-sixth March, 1769, was offered in evidence. The probate on which it was recorded was the affidavit of one Etting before the president of the court of common pleas of Franklin county, that Semple had acknowledged the assignment to be his and desired it to be recorded; and that three certain parties were witnesses thereto.

Hamilton, for the plaintiff.

Duncan, for the defendant.

The court said that the affidavit was illegal and informal, and did not authorize the recording of the transfer. It was no evidence whatever of notice to the defendant, and could not be received: 3 Cranch, 155.

Verdict for the plaintiff.

TURBETT v. TURBETT'S EXECUTORS.

[3 YEATES, 187.]

CONSTRUCTION OF WILL.—Every sentence and word in a will must be considered in forming a judicial opinion on it.

MEANING OF WORD "ESTATE."—The word estate in a will carries everything, unless restrained by particular expressions.

ACTION of account. Pleas, never bailiffs, or receivers, and fully accounted.

The action was founded on the will of Samuel Turbett, dated June thirteenth, 1796, wherein, after directing his debts to be paid, he devised as follows: Item, my property in Lancaster, I order to be sold at the discretion of my executors, and the moneys thence arising I order to be thus distributed: To my excellent friend, Mrs. Elizabeth Fulton, fifty pounds; to Kitty and Betsey Connor, each fifty pounds; to Dr. Murray, fifty pounds; and to my nephew, William Turbett, son of Jonathan, two hundred pounds. The residue of that part of my estate I give and bequeath to my dear wife, Dolly, after a genteel suit of mourning for my executors. With regard to my Tuscarora estate, if my brother, Thomas, will take it at one thousand pounds, one-half cash, or upon interest from the day of acceptance, and the other half to carry interest three years after that date. In case my brother Thomas refuses this offer, my executors will then proceed to the sale of that estate, by private or public sale, as they may judge best; as well my stock, farming utensils, store goods, etc., still reserving to my dear Dolly the Shillelah mare and her furniture, together with all the household furnitures of what kind or degree soever. My apparel I leave entirely at her disposal. This property being thus turned into money, I order the widow of my brother, John, her dower, agreeable to his will, to be paid by my executors; and two hundred pounds to be put out at interest for the dear orphan child, Priscilla Turbett, daughter of my brother, John, to be paid to her when she arrives at the years of discretion, and if she dies before then, that sum I order to be paid to my brother, Thomas. These arrangements being made, I give and bequeath to my dear Dolly all the remainder and residue of that part of my estate, and to her heirs and assigns forever. My fine boy, Lecky, I order to be paid twenty pounds. If my wife chooses to remain on the farm she has my approbation, reserving to herself two of the best milch cows. I bequeath to her my largest silver watch, and to William Turbett my small-

est " And appointed John Moore and Dorothea, his wife, his executors.

The Tuscarora personal property was appraised at two thousand one hundred and six pounds nine shilling and eightpence. Besides this sum the executors admitted that the testator owned stock and deferred debts to the amount of one thousand five hundred and twelve dollars and eighteen cents. The testator died July 1, 1796.

The plaintiff claimed the whole of the estate in Tuscarora, real and personal, upon the payment of the one thousand pounds. The recommendation of the court that a special verdict be agreed upon, so that the legal construction of the will might be ascertained, was not acceded to; and the defendant offered to prove the purchase by the plaintiff of a number of articles at a public sale of the personal property on the farm. This was objected to as not affecting the devise.

By COURT. If the matter was to end in a special verdict we should think the testimony idle and irrelevant. But if the jury are to determine the issues, surely it must be laid before them to assist them in ascertaining whether the articles belonged to the plaintiff or not. With us the testimony has no weight.

An administration account settled in the register's office was admitted in evidence, to which the plaintiff excepted. From this account it appeared that thirteen hundred and ninety-eight pounds fifteen shillings and threepence remained in the executors' hands after payment of debts, and two judgments recovered against them for four hundred and thirty pounds.

Several witnesses were examined as to the value of the Tuscarora lands in Mifflin county at the time the will was made, and much diversity of opinion prevailed; although all agreed the lands were of more value to the plaintiff than to any other by reason of his owning the adjoining tract of land, and he himself acknowledged, after his brother's death, that he had a good bargain at one thousand pounds.

Duncan and Watts, for plaintiff.

Hamilton and Walker, for defendant.

The COURT charged the jury as follows: The intention of the testator must govern the construction of his will, and it must be collected from his own words. His true mind must be our guide; and we are not to judge from events, let the case be ever so hard or injurious to any particular devisee. It is obvious

that the will has been drawn incorrectly. It has been contended that the testator must have contemplated a bounty to his brother, Thomas, by his devise to him of the Tuscarora estate at one thousand pounds, and that he had the same pretensions to the personalty in Mifflin county which the widow has to the personalty at Lancaster; both being given by the same term, estate; and that having made no provision for the sale of his stock, farming utensils, store goods, etc., unless in the event of his brother's refusal of his offer at one thousand pounds, he must necessarily have intended that the personalty should not be sold if the offer was accepted; and of course that it was included in the devise. Every sentence and word in the will must be considered in forming our judgment upon it. It does not appear that the testator had any personal property at Lancaster, except the few necessaries which he carried with him on his journey. The two houses to which he conceived himself entitled there must have been the objects contemplated in the expressions, my property in Lancaster and that part of my estate. A variety of cases have occurred on the legal meaning of the word "estate," in a devise. It will certainly pass a fee in a will without words of inheritance: *Skin.* 194; 3 *Mod.* 45, 228; 6 *Id.* 110; 8 *Id.* 255; 1 *Wils.* 333; *Cowp.* 301; 3 *Burr.* 1618; 4 *Mod.* 89; 1 *Salk.* 236; 1 *Mod.* 100; *Comy.* 340; *Lofft.* 95, 96, 100; 4 *T. R.* 93; 2 *Vern.* 564; *Talb. Cas.* 157, 184; 3 *P. Wms.* 297; *Gilb. Rep.* 284; 2 *Atk.* 102, 38; *Doug.* 730; 1 *Dall.* 226. It will carry everything unless restrained or tied down by particular expressions: 1 *T. R.* 411; 2 *Id.* 656; 5 *Burr.* 2639. It is *genus generalissimum*. It is natural to suppose that the testator used the word estate in the same sense when applied to the property either in Lancaster or Tuscarora. The estate at the latter place is devised to his brother Thomas, if he will take it at one thousand pounds. If he should refuse this offer, the executors to proceed to sale. The testator guards against the event of his brother declining the pre-emption at a stipulated price. He must therefore be supposed to have entertained doubts whether Thomas would accept it; and to have fixed a sum something like the reasonable value of the lands. Indeed he holds up a strong apprehension that Thomas would not take the lands; because in the close of his will he directs: "If his wife chooses to remain on the farm, she had his approbation, reserving to herself two of the best milch cows," which were part of his stock. It would be passing strange to presume him to have any suspicions of his brother's declining to take the whole

property, real and personal, in Mifflin county, at one thousand pounds when the personalty alone exceeded twenty-one hundred pounds, and the lands were more valuable to Thomas than any other person ! And yet this absurdity necessarily arises from the plaintiff's construction.

Nothing can be inferred from the power given to the executors to sell the stock, farming utensils, store goods, etc., in the single case of Thomas's refusal to take the lands. The executors as such, had the undoubted right of disposing of the personal property not specifically bequeathed. A strong argument may be deduced from the circumstances of there being no express devise to the plaintiff, except the two hundred pounds which he had given to his niece, Priscilla, in case she died in her minority. He had bequeathed the like sum to his nephew, William, and his small silver watch. But excepting this contingent two hundred pounds, he devised no legacy whatever to either of his brothers. Under the plaintiff's construction, can it be accounted for with any consistency, that the testator meant, in the event of his brother, Thomas, accepting the offer of the Tuscarora estate at one thousand pounds, he should sweep away the great bulk of the whole property, and yet if he refused the terms, he should take nothing whatever ?

The testator gave to his widow all the residue of that part of his estate, deducting the legacies. This cannot mean of the limited price only of one thousand pounds, because it is not so expressed. The residue of the money arising from the Lancaster estate he had before devised to her. Must it not then necessarily refer to the personalty in Mifflin county, and the sales of the lands there, either to his brother or a stranger ? Does it not exclude the idea that Thomas should take the personalty with the realty at one thousand pounds ? He draws a distinction between his estate in Tuscarora, and his stock, farming utensils, store goods, etc. Under the former words his lands are described ; under the latter his movable property.

For these reasons the court judging *ex visceribus testamenti*, are clearly of opinion that the testator did not intend to include his personalty in Mifflin county, in his devise of his Tuscarora estate to his brother, Thomas ; and consequently that the executors are not bound to account with the plaintiffs therefor.

Verdict for the defendants.

See *Mably v. Stainback*, 1 Am. Dec. 545, for a similar construction of the word estate.

JORDAN v. MEREDITH.

[3 YEARS, 312.]

USAGE, UNREASONABLE.—The usage of plasterers to charge half the size of the windows, at the price agreed on, for work and materials is unreasonable and bad.

NEW TRIAL, WHEN DENIED.—The court will not grant a new trial unless it is satisfied injustice has been done; therefore a talesman sworn on the jury, after being struck off the list of special jurors, is no ground for awarding a new trial.

Motion for a new trial. The action was *indebitatus assumpsit*, brought for plastering two large houses. It appeared on the trial that the price agreed upon was two shillings per square yard, the workmen furnishing the materials, although the usual price was one shilling per square yard if the owner furnished the lime, sand, etc. The plaintiffs claimed the balance of four hundred and twelve pounds nine shillings and sixpence.

The principal point in controversy was as to the mode of mensuration. The plaintiffs insisted that, in accordance with the general usage, one-half part of the size of each window ought to be included in the measurement; and one hundred and seven pounds twelve shillings was said to have been charged on that ground. This was resisted by the defendant; and the respective estimates were submitted to the jury without argument. A verdict was found for the plaintiff for three hundred and seventy-six pounds eleven shillings and tenpence.

M. Levy, on behalf of the defendant, based his motion for a new trial on two grounds: 1. That it must be presumed the jury adopted the plaintiffs' system of mensuration, and thereby allowed fifty-three pounds sixteen shillings for materials never furnished; 2. That one of the special jurors who had tried the cause as a talesman had been struck out of the list by the defendant: 2 Ld. Raym. 1410.

Ingersoll and Ross, for the plaintiffs, contended that should the court be of opinion that the custom referred to was bad, the *onus probandi* lay on the defendant to make the error of the jury distinctly appear. Suppositions will not warrant the interference of the court; a new trial will only be granted on substantial grounds, where manifest injustice has been done, or the verdict is contrary to the evidence: 2 Dall. 53. The exception to the juror comes too late. The case from 2 Ld. Raym. was that of a juror who, after being challenged, was sworn by a

different name. In support of their position counsel cited: 1 Tri. Per. Pais. 203; Style, 100, 129; 2 Salk. 646; 12 Mod. 567; 11 Id. 119; 1 T. R. 717.

By COURT. The pretended usage of the plasterers in the present instance is unreasonable and bad in itself. To charge an employer with materials never received is the height of injustice. But we have no proof that the jury committed this error, and we are not justified in setting aside a verdict on mere conjecture. To warrant our interposition we must be clearly satisfied that injustice has been done, or some plain mistake committed.

The defendant should have challenged the juror before he was sworn. He has slipped his time by postponing his objection till this period. If he has been guilty of inattention he alone should suffer for it. And so is the current of authorities in the books.

Motion for a new trial denied.

This case was criticized by the court in *Walls v. Bailey*, 49 N. Y. 464; S. C. 10 Am. Rep. 407. In the case it was decided that a custom of plasterers was not unreasonable whereby they charged for the full surface of the walls, without deductions for doors, windows, etc. This is a well considered case on the subject of usage, and the authorities are there fully examined. Referring to the principal case the court say: "The appellant has cited to us *Jordan v. Meredith*, 3 Yeates, 318, in which it is said that the pretended usage of plasterers to charge for a part of the openings is unreasonable and bad. The reason there given why it is so is, that it is the height of injustice to charge an employer with materials never furnished. But as to this case it is to be remarked that this expression is *obiter*. For it did not appear that the jury found that there existed the usage commented upon; and the decision of the case is put upon the ground that there was no proof that the jury had been governed by a usage."

In *Coxe v. Heisley*, 19 Pa. St. 247, referring to the decisions on the subject of usage, the court say: "Our own decisions on this subject have not been very consistent. This court in the early cases stood over the law, and guarded it against invasion faithfully enough. A rule among merchants to charge interest for goods sold after six months: 1 Dall. 265; a usage of plasterers to charge for their work at a certain rate: 3 Yeates, 318; a custom to re-enter for a forfeiture, incurred by non-payment of rent: 6 Rinn. 417. All these were held to be inadmissible. But in 1822, a custom on the Ohio river was permitted to vary the responsibility of a carrier there: 8 Serg. & R. 533; and nine years later a usage in Philadelphia was allowed to add a warranty to a contract of sale, which in fact and in law did not embrace one: 3 Rawle, 101. In both these cases, Chief Justice Gibson dissented from a bare majority; and his warning, though unheeded at the time, was remembered when the question came up again: 3 Watts, 179; 5 Barr. 42. Our latest decisions are consistent with the oldest. The law of Pennsylvania may, therefore, be considered as settled in accordance with

reason and with the judicial authorities of other commercial states. A local usage, if it be ancient, uniform, notorious, and reasonable, may enter into, and become part of a contract, which is to be executed at the place where the usage prevails; but here, as elsewhere, it is checked by this wholesome limitation that it must not conflict with the settled rules of law, nor go to defeat the essential terms of the contract."

CROUSILLAT v. BALL.

[3 YEATES, 375; S. O. 4 DALLAS, 294.]

EVIDENCE AS TO PROPERTY SHIPPED.—A letter from a captain to his owner cannot be received, on the part of the owner, as evidence of the character of the property on board unaccompanied by invoices or bills of lading.

CAPTAIN'S PROTEST.—A captain's protest may be received as evidence in an action on a policy of insurance.

BROKER AGENT FOR BOTH PARTIES.—A broker on effecting a policy is agent of both parties, and notice of abandonment to him is sufficient to charge the indorser.

DECREE OF FOREIGN COURT OF ADMIRALTY.—As between insurer and insured, the decree of a foreign court of admiralty is conclusive only where warranties are inserted in the policies.

DURATION AND EXTENT OF POLICY.—Policies effected in time of peace continue though a war breaks out; the insured, however, must not do anything to add to the risk of the insurer.

BARRATRY OF MASTER.—On a declaration stating a loss by capture, there can be no recovery on the barratry of the master, and where in a special verdict the jury have found certain misconduct of the master, the court will not infer that the risk of the insurer was increased thereby.

ACTION on a policy of insurance for two hundred pounds at a premium of twelve pounds, dated December 29, 1792, on all lawful goods and merchandise, laden or to be laden on board the brigantine *Sophia*, George Price, master, from Philadelphia to New Orleans, and from thence back to Philadelphia, with liberty to touch and trade, both on her outward and homeward passages, at one port in Hispaniola, warranted free from any charge, damage or loss resulting from a seizure or detention on account of illicit or prohibited trade. The declaration stated a loss by capture.

It appeared in evidence that the plaintiff was the owner of the vessel, and had goods on board to the amount insured. The captain was consignee of the cargo to New Orleans and Port au Prince. The policy was executed in time of peace, but France declared war against Great Britain on first of February, 1793. At St. Domingo, the captain received from certain

French inhabitants quantities of West India produce, falsely marked L. C., and covered as American property. After clearing from Port au Prince, on the eighteenth of June, 1793, the vessel was captured by a British privateer, and carried to Jamaica, where, on the sixth November, 1793, the goods, merchandise, etc., were condemned as good and lawful prize. The captain filed a claim for his owner, and the brig was restored to him on behalf of Crousillat. From this decree an appeal was entered, and the judgment affirmed, except as to costs, which were remitted.

On the twenty-seventh January, 1794, the plaintiff wrote to Taylor, a broker, and directed him to inform the underwriters of the abandonment of the cargo, referring him to the captain's protest and a copy of the admiralty proceedings. Shortly afterward the defendant and other underwriters held a meeting on the subject of the loss, but not giving any answer within thirty days, the plaintiff, without consulting them, prosecuted the appeal as aforesaid.

Tilghman, Dallas and Du Ponceau, for the plaintiff.

Ingersoll and Rawle, for the defendant.

The plaintiff offered at the trial letters of the captain, to show the manner of shipping the merchandise, and who were owners thereof. Defendant objected that the captain was the plaintiff's agent; that he ought to have been examined by commission, and shown his invoices and bills of lading.

By Court, SHIPPEN, C. J., YEATES, SMITH and BROKENRIDGE. The letters could not be received in evidence without the utmost danger. Invoices and bills of lading are the usual modes of proving property, of which no seaman is ignorant, though they are not exclusively so. As well might the letters of the owner himself be produced to prove the property in the goods shipped, as those of his agent and consignee. We go further than the courts of Westminster Hall, in allowing the captain's protest to be received in evidence in all cases of insurance. But in England, it is refused unless under certain special circumstances in late cases: 7 T. R. 158; 2 Esp. 490.

Defendant then urged that notice of abandonment to the broker did not charge the underwriter, unless traced to him. That the broker was the insurer's agent, upon whom the loss must fall if the broker omits to do his duty. Moreover the abandonment had been relinquished by plaintiff's electing to prosecute

his appeal; and defendant could not be held liable for the costs of an appeal taken without his concurrence.

Plaintiff replied, that the broker was the agent of both parties, being mutually employed: 1 Dall. 420; that a verbal notice of abandonment to the broker was sufficient: *Duncan v. Coates*; and notice of the abandonment to the defendant is to be presumed from his meeting the underwriters to consult upon the loss. A relinquishment of the abandonment is not to be implied against the declared intention at the time of cession.

By Court. Though the broker in the first instance might, with the strictest propriety, be deemed the agent of the party employing him, yet when the policy is effected, he necessarily becomes the agent of both parties. He receives the premiums for the underwriters, and settles the proportional quotas in case of loss. In the reason of the thing founded on common experience, a notice of abandonment to him must be sufficient. The costs of the appeal may be involved in the other point, about which the brokers have disagreed, but the relinquishment of the abandonment cannot be implied under the circumstances of this case.

It was further contended that the decree of the admiralty court precluded the plaintiff from recovering, and was conclusive evidence of the character of the property condemned: Parke, 403; *Barisillay v. Lewis*, Id. 410; *Soloucci v. Woodmass*, Id. 413.

The plaintiff insisted that there was a difference between policies with and those without a warranty; that in the cases where recoveries have been prevented on account of a decree of foreign court of admiralty, there have uniformly been warranties of neutrality: 8 T. R. 196, 197. Of this opinion was the court.

Counsel for the defendant then argued that the warranty against illicit or prohibited trade had been broken. Contraband articles affect innocent parts of the cargo belonging to the same person: 1 Robins. Ad. Cas. 26. In prize courts the rule is *falsus in uno falsus in omnibus*: Id. 213. The master can bind the owner by his misconduct: 2 Id. 70, 71, 127, 131. The rule that the insurers must bear the risk in case of a war breaking out, must be taken with the restriction that the vessel be able to perform her voyage unless some external accident should happen: Parke, 249; 5 Burr. 2804; and must conform to the strict rules of neutrality: 8 T. R. 197; Id. 230. It was contended for the plaintiff that the warranty in the policy respected violations of the revenue laws alone; that although the property

of a belligerent had been received on board, yet that fact was not a sufficient ground for the condemnation of goods belonging to other persons; nor would the insurers be discharged thereby.

SHIPPEN, C. J., delivered the charge of the court. It is a settled principle that policies of insurance shall always be construed according to the intention of the contracting parties, and not according to the strict and literal meaning of the words: Parke, 33. They shall be taken largely for the benefit of trade and for the insured, and the usage of trade may be called in to explain any doubts: Id. 44; 1 Burr. 348. Insurance made in time of peace continue, though a war should break out; but it would be inequitable that the insured should do anything in the voyage insured which should add to the risk of the insurer. The latter runs sufficient risks, in the event of a war, without being subjected to new chances. The case of deviation may be fairly brought in by way of analogy. If there is a voluntary departure, without necessity or any reasonable cause, from the regular and usual course of the specific voyage insured, the underwriters are discharged from any responsibility. Nor is it at all material whether the loss be or be not an actual consequence of the deviation; for the insurers are in no case answerable for a subsequent loss, in whatever place it happen, or to whatever cause it may be attributed. Neither does it make any difference whether the insured was or was not consenting to the deviation: Parke, 335, 336. It seems here, that a smuggling voyage to a French island was mutually understood to be insured. The captain was the agent and immediate consignee of the cargoes at New Orleans and Port au Prince. On a war breaking out between Great Britain and France, he might perhaps have taken French property on board at the latter port, but he ought not to have masked it as American property, under the false marks of the initials of his owner's name. He should have transacted business in the ordinary mode, by signing bills of lading and having regular invoices of the shipments made for his owner. Whether the West India admiralty judge and the court of appeals have given correct sentences or not, it is not our province to determine; but certainly, when it appears that enemy's property has been covered by false marks to a considerable extent, no invoices or other documents to ascertain the plaintiff's interest produced, papers proved to have been privately concealed, and the captain and consignee has been guilty of willful false swearing, the mind of every reasonable man will be affected

by such testimony. The judge must see this mass of circumstances in the same light in which it would strike the common understandings of mankind. We think, in the nature of the thing, that the risk of the insurers must be increased by such conduct of the agent of the insured, and against which the former never undertook to indemnify for the premium which they received. Whether such conduct of the captain increased the risk or not is a matter proper for the consideration of the jury, and their verdict must depend on the result of their deliberations on this question.

The jury not being able to agree on a general verdict, found the following special verdict: "That Louis Crousillat, the plaintiff, caused the insurance to be made as laid in the declaration; that he had property on board the brig Sophia therein mentioned to the amount insured; that the defendant subscribed the policy; that the said brig was captured and carried into Kingston by a British privateer, where she was libeled, as stated in the copy of the record of the proceedings of the court of vice-admiralty, and finally condemned; that George Price, the captain of the said vessel and consignee of the plaintiff's property on board the same, in the course of the proceedings in the court of vice-admiralty, was guilty of perjury; that there were false marks on goods on board the said Sophia, when so captured, differing from the oath made by the said George Price, and also that papers were concealed on board the said brig Sophia; that the plaintiff abandoned to the defendant and claimed for a total loss, in due time; and that this suit was commenced in due time, after the expiration of the time mentioned in the policy; and if upon the whole the court shall be of opinion that the law is in favor of the plaintiff, the jury find for the plaintiff and assess damages at one thousand and twenty-four dollars and eighty-six cents; but if in favor of the defendant, then they find for the defendant."

It was agreed by the parties that, notwithstanding the reference to the decree of condemnation in the special verdict, such decree should not be considered conclusive upon the plaintiff.

On this special verdict the counsel for the plaintiff urged that it appeared the captain was guilty of barratry, and the defendant must, therefore, be liable. That any act of the master or of the mariners which is of a criminal nature, or which is grossly negligent, tending to their own benefit, to the prejudice of the owners of the ship, without their consent or

privity, is barratry: Parke, 94; 2 Ld. Raym. 1349; 1 Str. 581; 2 Id. 1173; Cowp. 143; 1 T. R. 323; 4 Id. 33; 7 Id. 506, 508.

Counsel for the defendant replied that if plaintiff founded his expectations of recovery on the barratry of the captain the declaration should have been framed accordingly. In cases where the insurers have been liable for barratry, a count to that effect has been laid: Parke, 455; Cowp. 743; *Hood v Nesbit*, 2 Dall. 137 (1 Am. Dec. 265); 8 T. R. 234.

By COURT. Nothing could be clearer than that the averment of the loss was a most material part of the declaration. If it is not laid truly, or can be shifted from a capture to a barratry, the defendant could never come prepared to answer it. If even the facts were more specially found as in *Hood's Executors v. Nesbit*, 2 Dall. 137 (1 Am. Dec. 265), we could not take them up as barratry on the present record.

The plaintiff finally contended that, in determining on the special verdict, the court must judge either from the matter charged in the libel and found in the sentence, or from a lawful cause of condemnation by the general law of nations. No cause is made to appear; the libel charges the property to be French, and the decree affirms the charge, but no breach of neutrality is alleged, although the decree assigns that as a reason for not allowing freight. What effect the captain's conduct had upon the mind of the admiralty judge does not appear; nor was the plaintiff privy to the master's acts for anything appearing on the record. The court, therefore, not being allowed to draw influences from the special verdict, must decree the condemnation to have been on the ground of enemy's property: 8 T. R. 234; for where the condemnation goes on special ground, it ought to be stated: Id. 230.

Defendant's counsel insisted that the circumstances on which the sentence of the court of admiralty was founded might be inferred from the whole proceedings; that it was the conduct of the captain that increased the risk, which was not contemplated by the insurance. The words encouraged and abetted, in a special verdict on an indictment for a criminal offense, have been held tantamount to aiding and assisting, as a necessary consequence of the act found: 4 Burr. 2081. So as to an inference of malice: *Oneby's case*.

By COURT. The word abetting made the party a principal in the second degree: 4 Burr. 2082. And it is the province of the court to determine what acts afford proof of malice: Burr. 396,

474, 937; 3 T. R. 428. But it is clearly settled that they are confined to the facts found in a special verdict, and cannot supply the want thereof by any argument or implication from what is expressly found: 2 Haw. c. 47, sec. 9. Is it possible for this court to infer that the conduct of Captain Price increased the risk of the insurer (though our private judgments may be fully satisfied on that point), when it has been submitted as a fact proper for the jury's consideration, and they could not agree in their conclusion after repeated efforts? No judgment can be rendered on this verdict, and therefore a *venire facias de novo* is awarded.

RESPUBLICA v. NEWELL.

[3 YEATES, 407.]

INDICTMENT FOR PERJURY—STATING HOW SWORN.—An indictment for perjury, which avers that the defendant did “then and there, in due form of law, take his corporal oath,” without stating that he was sworn on the gospels, or by uplifted hand, is sufficiently certain.

SAME—CHARGE, HOW STATED.—An indictment for perjury at common law, which states that the defendant “did, voluntarily and of his own free will and accord, propose to purge himself upon oath of the said contempt,” negating, by express averments, the truth of the oath, and concluding that the defendant “did knowingly, falsely, wickedly, maliciously and corruptly commit willful and corrupt perjury,” etc., is good.

SAME—FORM OF CONCLUDING.—An indictment concluding “contrary to the act of assembly in such case made,” etc., where the offense is prohibited by the common law only, is, nevertheless, good.

Motion in arrest of judgment in an indictment for perjury. The indictment was for perjury committed by the defendant in answer to certain interrogatories regarding an alleged contempt of court by the defendant, who was charged with uttering the following language, when an order was served upon him to show cause why an attachment should not issue for disregarding a *certiorari* directed to him: “Damn the court, they are a set of damned stool-pigeons.” The defendant failed to appear at the time ordered, but afterward voluntarily appeared for examination to purge himself of the alleged contempt, and swore he did not use the language stated.

The indictment charged that “the said R. N. did then and there, in due form of law, take his corporal oath before the said court,” which had sufficient and competent power and authority to administer the same. It concluded that the defendant “by

his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner and form aforesaid, did knowingly, falsely, wickedly, maliciously, willfully and corruptly commit willful and corrupt perjury, to the great displeasure of Almighty God, to the evil and pernicious example of all others in like case offending, contrary to the act of general assembly, in such case made and provided, and against the peace and dignity of the commonwealth of Pennsylvania."

Duncan, for the defendant.

Watts and Brown, for the commonwealth.

The reasons given for arrest are fully stated in the opinion.

By Court, SMITH, J. The defendant has been found guilty of willful and corrupt perjury, in his answers to certain interrogatories filed in the court of common pleas of Franklyn county, touching certain opprobrious expressions made use of by him respecting the same court. His counsel have filed reasons in arrest of judgment, which we have fully considered. I shall first premise that tenderness ought always to prevail in criminal cases, so far at least as to take care that a man may not suffer otherwise than by due course of law, nor have any hardship done him, or severity exercised upon him, where the construction may admit of a reasonable doubt or difficulty: 4 Burr. 2082. We are bound to pronounce the law as we think it is; always leaning to the favorable side, where we doubt. For so says the law: *Rex v. Wilkes*, 4 Burr., per Lord Mansfield.

1. The first reason in arrest of judgment is, that the deposition on which the perjury is assigned is stated to be on an interrogatory filed between the commonwealth and the defendant; on the part of the commonwealth without stating any proceeding between the commonwealth and the defendant, in which the said deposition would be material.

This objection was taken at the trial under another shape, and was overruled by the court. It was then said, that the interrogatories were wrongly entitled; that the plea was pending between James Taylor and Thomas Shirley, and the rule was entered in that cause; and inasmuch as the proceedings were on the civil side of the court until the attachment issued, the interrogatories should have been filed in that suit, and headed accordingly. To this point was cited 3 T. R. 253, and 6 Id. 642, note, and the case of *Caleb Wayne*, lately decided in the circuit court of the United States, for the eastern district of Pennsyl-

vania. The answer given was, that we had not adopted that nicety of form here which was practiced in England; but at the utmost, that the defendant should have taken advantage of the informality, and showed to the court the grounds of his refusal to answer the interrogatories. He was now too late, after he had come in and voluntarily submitted to answer. The rule was entered in December term, 1799, that the defendant should show cause why an attachment should not issue against him, for treating the process of the court with contempt, and using opprobrious words respecting the court. This rule was grounded on due proof made of his improper conduct previous thereto. He was then actually in contempt. We considered the rule to show cause in such a case as wholly unnecessary. For contemptuous words spoken of a court, its rules or process, an attachment issues immediately of course: Sayer, 114, 1 Str. 185. The party must answer in custody; for it is to no purpose to serve him with a second rule who has slighted and despised the first; it would expose the court to further contempt: 1 Salk. 84. The jurisdiction of the court on its criminal side, grew out of the civil action, returned on the *certiorari* in the plea above stated, and the oath of the party became material. The issuing of the attachment is only for the purpose of bringing in the party to answer to the interrogatories; and if he can swear off the contempt he is discharged: 12 Mod. 348. If he deny all on oath he is set at liberty; but he must be indicted for perjury if he forswear himself: 12 Mod. 511; 8 Id. 81; Doug. 498; Mos. 250; 1 Str. 444; Annal. 178; 4 Burr. 2106. When, therefore, Newell appeared in the court of common pleas to purge himself of the contempt charged against him, we viewed him in the same light as if his presence had been enforced by attachment, and were of opinion that in either case the interrogatories should be entitled in the same manner. We considered the rule to show cause, stated in the indictment, as mere matter of inducement. An indictment for perjury at an assize, may allege the oath to have been taken before one of the judges in the commission, though the names of both are inserted in the caption: Leach, 154.

2. The second objection is that it is not stated that the defendant took an oath on the holy gospel of God, or in the presence of Almighty God, by uplifted hand. The indictment that "the said Robert Newell did then and there, in due form of law, take his corporal oath," etc. This form was approved of by Lord Hardwicke, who says: "The words corporal oath

may stand for lifting up an arm or other bodily member." What is universally understood by an oath is, "the person who takes it imprecates the vengeance of God upon him, if the oath he takes is false:" 1 Atk. 20. In the great case of *Omychund v. Barker*, Ld. Chan. Baron Parker said he did not think *tactis sacris Evangeliiis* were necessary words; for several old precedents are, that the party was *juratus* generally, or *debilo modo juratus*. Vide West's Symb. 2d part, under the head of Indictment and Offenses, sec. 160; 1 Atk. 43, 44. Lord Chief Justice Willes says, that *sacrosancta Evangelia* are not at all material words in indictments for perjury: Id. 46. Lord Chancellor Hardwicke asserts the same opinion, and observes that the framers of indictments are apt to throw in words, and to swell them out too much to no purpose; therefore the old precedents are the best: Id. 50. According to Lord Chief Justice Kenyon, an indictment for perjury is sufficiently certain if it only states the defendant to have been in due manner sworn: Peake, 156; *Mee v. Reid*, Id. 23; *Mildrone's case*; Leach's Crown Cases, 348.

3. The third reason in arrest of judgment is most material, and has obtained from us much consideration. It is this: that in the assignment of the perjury, it is not stated that the defendant did falsely, corruptly and willfully swear, etc. If the indictment is considered as grounded on the statute 5 Eliz. c. 9, it is certainly defective; because the words willfully and corruptly are inserted in the sixth paragraph as material descriptions of the offense. And it is clearly settled that in every prosecution on this statute the words thereof must be exactly pursued, and therefore that an indictment or action on the said statute, alleging that the defendant deposed such a matter *falsè* and *deceptivè*: 2 Leon. 211; 3 Id. 230; 1 Skin. 190; or *falsè et corruptivè*, 12 Cro. Eliz. 147; or *falsè* and *voluntariè*: Sav. 43, without expressly saying that he did it *voluntariè et corruptè* is not good; and that such a defect cannot even be supplied by adding the words *contra formam statuti*, or concluding *et sic voluntarium et corruptum commisit perjurium*: 2 Leon. 214; 1 Id. 230; Hetl. 12; Sav. 43; Cro. Eliz. 147; 1 Hawk. c. 69, sec. 17.

The present indictment concludes: "Contrary to the act of general assembly in such case made and provided." But, on examining our statute book, it will be found that the only law respecting this offense in courts of justice was enacted on the thirteenth of May, 1718; the twenty-fourth section whereof goes to subornation of perjury; and the twenty-fifth section extends the English statute of 5 Eliz. c. 9, and declares that this statute

shall be put into due execution here: 1 St. Laws, 143. The act of fifth April, 1790 (2 St. Laws, 804), which was made perpetual by the act of fourth April, 1799 (4 St. Laws, 399), prescribes fine and imprisonment in lieu of the former infamous punishments of pillory and whipping. It will be further found that this statute of 5 Eliz. c. 9, extends to no other perjury than that of a witness; and, therefore, no one can come within the statute by reason of any false oath in an answer to a bill in chancery: Cro. Eliz. 148; 2 Leon. 201; Dalis. 84; Yelv. 120; or in swearing the peace against another: 2 Rol. Ab. 77, pl. 5; or by reason of a false wager of law: 7 Noy. 108; or for taking a false oath before commissioners appointed by the king to make an inquiry concerning his title to certain lands: Moor, 627; 1 Hawk. c. 69, sec. 20. It therefore necessarily follows, that if the indictment had been framed with the utmost correctness, under the statute of 5 Eliz. the offense of the defendant was not punishable thereby, because he was not a witness examined in a court of justice in the usual course of proceeding. But the law is perfectly ascertained that one may be guilty of perjury at common law in respect of a false oath, taken by him in his own cause, in answer to questions put to him in a court of law having power to purge him upon oath, concerning his knowledge of the matters in dispute: 1 Rol. Ab. 40, pl. 15, 83, pl. 9; Cro. El. 609. So, also, in a court of equity: 1 Leon. 127; Cro. Eliz. 135, 905; 1 Sid. 244; 1 Hawk. c. 69, sec. 5.

This introduces the great question whether this indictment can be supported against the defendant on the principles of the common law. It was formerly held that no indictment grounded on a statute, and concluding *contra formam statuti* could be maintained as an indictment at common law; but the contrary is now adjudged, and the words *contra formam statuti* shall be rejected as useless where the offense is prohibited by the common law only. The substance of the indictment being found, the rest is but surplusage, which hurteth not the verdict, and it shall be taken as it may stand by law: Atk. 43; Sty. 86; 1 Sid. 421; 2 Keb. 138, pl. 5; 1 Salk. 212; 2 Hawk. c. 25, sec. 115; 5 T. R. 162.

Perjury is defined by Lord Coke to be a crime committed when a lawful oath is administered in some judicial proceeding to a person who swears willfully, absolutely and falsely, in a matter material to the issue or point in question: 3 Inst. 164; 4 Bl. Com. 137. And in 10 Mod. 195, it is laid down that the oath must not only be false, but willful and malicious to make

it perjury. Here, the legality of the oath and the propriety of the judicial procedure are indisputable. The indictment states that the defendant did "there and then voluntarily, and of his own free will and accord, propose to the said court to purge himself upon oath of the said contempt alleged against him; that he was then and there duly sworn on his corporal oath, and then and there did answer and declare," etc., negating by express averments the truth of his oath, with a conclusion that "he, the said Robert Newell, the day and year aforesaid, at Chambersburgh aforesaid, etc., by his own act and consent, and of his own most wicked and corrupt mind and disposition, in manner aforesaid, did knowingly, falsely, wickedly, maliciously and corruptly commit willful and corrupt perjury," etc. On the bare reading of the indictment, one would reasonably suppose that the willfulness, absoluteness, falsity and malice of the oath were sufficiently asserted and charged against the defendant. But his counsel have ingeniously objected that it does not pursue the course of the precedents, and that the offense is not laid in a manner known to the law. We hold ourselves bound by precedents. We flatter ourselves we can say, with Lord Chief Justice Kenyon, "it is our wish and comfort to stand *super antiquas vias*:" 7 T. R. 668. In criminal cases we will not intentionally inflict new hardships on any one, let our individual feelings be what they may. To satisfy our minds in this particular, my brother Yeates and I have made diligent and painful researches into the books of entries on the criminal law. The result of our inquiries has been as follows:

In *Rex v. Oates*, 5 St. Tri. 4, the indictment for perjury charges him that he falsely, voluntarily and corruptly did say, etc. So on the second indictment against him: *Id.* 70. In *Rex v. Sir Patience Ward*, 3 St. Tri. 661, the information states that he falsely and corruptly did swear, etc. In *Rex v. Elizabeth Canning*, 10 St. Tri. 206, the indictment charges, that she did falsely, wickedly, voluntarily and corruptly say, etc. In Tremaine's Pleas of the Crown, 136 to 167, there are thirteen indictments for perjury, all of which are laid with the epithets, or some of them, falsely, corruptly, maliciously and voluntarily, etc. In Stubb's Crown Circ. Comp. 308 to 334, there are seven indictments with the same epithets applied to the acts of swearing. So in Clift's Entries, 399, 401, there are two informations for perjury at the assizes, that the defendant maliciously, voluntarily and corruptly swore, etc. And in *Rex v. Greepe*, 5 Mod. 343, an information at common law for perjury in a trial at bar in re-

plevin charges the defendant, that he falsely, maliciously, voluntarily and corruptly, on his oath, said, etc. In Co. Ent. 164 b, 357 a, there are two precedents of actions brought in debt, on the Stat. 5 Eliz. c. 9, wherein it is laid that the defendants voluntarily and corruptly swore, etc. And so in many other actions of debt in other books. On the other hand, in the same book, 165 b, there is a form in a deposition before commissioners on interrogatories in chancery, wherein the epithets are not used. So in Rast. Ent. 481, the declaration lays the swearing without those terms *per quod idem R. voluntarie et corruptive commisit perjurium voluntarium*. In *Officium Clerici Pacis*, a book containing many excellent precedents, fol. 87, we find an indictment for perjury in a deposition resembling the present case in all particulars. It states that the defendant "being sworn, said, and upon his oath affirmed and deposed in manner following, etc.: Whereas in truth and in fact, etc., voluntarily and corruptly committed voluntary and corrupt perjury," etc. Again, in West's Symbol. 119 b, sec. 160, another form of the same kind occurs for perjury in a deposition before commissioners by commission out of the court of wards. But in the same book and page, sec. 161, for perjury in a deposition before commissioners, by commission out of chancery, on the Stat. of 5 Eliz. after the words in the indictment, "whereas in truth the said H. S. did not cause, etc., neither, etc., (*negando effectum depositionis*) prout praedict W. falsè and corruptè deposuit et juravit, per quod," etc. And again, Id. 138, sec. 241, an indictment for perjury committed in an answer, in the exchequer at Chester, states that the defendant, on his oath, "said, affirms and swore these English words following, etc., and so the said R., in making and confirming his answers in that part aforesaid, the day of —, at, etc., voluntarily and corruptly committed voluntary perjury," etc. It is evident, therefore, that the forms of indictment at common law for perjury are not uniformly the same; but the words falsely, corruptly and willfully, as applied adjectively or adverbially to the act of swearing are mere expletives to swell the sentence, in the language of Lord Hardwicke: 1 Atk. 50.

We find no adjudged case or *dictum* in the books, that such words are appropriate terms of art, descriptive of the crime of perjury at common law, as *murdravit* in an indictment for murder, *cepit* in larceny, *mayhemiauit* in mayhem, *felonice* in felony, etc: 2 Hawk. c. 25, sec. 55. On the contrary, we do find it laid down by the judges, that an indictment for perjury at com-

mon law does not require so much certainty as on the statute, and that it need not be in a court of record, or matter material to the issue: 5 Mod. 348; 1 Sid. 106. And in *Cor's case*, Leach, 69, it was agreed by ten judges unanimously, that the word willfully was not essentially necessary in an indictment for perjury at common law, though it was essential in an indictment for perjury under the Stat. of 5 Eliz. c. 9, because the term willful, in the statute, is a material description of the offense. Still it is necessary that it should appear by the indictment, that the oath was willfully false.

It will readily be agreed that all indictments must have a precise and sufficient certainty, and that the offenses must be set forth with clearness and certainty: 4 Bl. Com. 305, 306. Every person should be apprised of the distinct charge made against him, in order that he may come fully prepared for his defense. But in the words of the humane Lord Hale: "The great, strict, and unseemly niceties required in some indictments, tend to the reproach of the law, to the shame of the government, to the encouragement of villainy, and to the dishonor of God." 2 H. H. P. C. 193.

4. The last reason offered in arrest of judgment is, that the indictment is insensible and repugnant, and is defective both in form and substance. This objection being made in general terms, must necessarily refer to the supposed defects, before particularly specified and already considered.

Upon the whole, on the best consideration which my brother Yeates and I have been capable of giving to the different reasons filed in arrest of judgment, our official duty constrains us to say that they are not relevant in point of law, and that the commonwealth is entitled to judgment.

RESPUBLICA v. PASSMORE.

[3 YEATES, 441.]

CONTEMPT—PUBLICATION CONCERNING A CAUSE.—The publication of a paper calculated to prejudice the public mind in a cause depending in court is a contempt, if it manifestly refers to the cause, though the reference may not expressly appear on the face of the writing.

CONTEMPT. Defendant was brought up for contempt, based on the following transactions: It appeared that an amicable action had been begun by Passmore against Bayard and Pettit, on a policy of insurance subscribed by Pettit and Bayard and

other underwriters. The matter was referred to two arbitrators, and in case of disagreement they to choose a third. A report was made in favor of Passmore for four hundred and ninety dollars, which was filed on the sixth of August, 1802; a *fieri facias* issued thereon returnable at the last September term, but the same was stopped on certain exceptions being filed on the third of September last, verified by the oath of Bayard. Upon these exceptions a rule was entered to show cause why the report should not be set aside. On the eighth of September, the defendant affixed to a board, in the exchange room in the city tavern, the following paper: "The subscriber publicly declares that Pettit and Bayard, of this city, merchants and quibbling underwriters, have basely kept from me, the said subscriber, for nine months, about five hundred dollars; and that Andrew Bayard, the partner of Andrew Pettit, did, on the third or fourth instant, go before John Inskeep, Esq., alderman, and swore to that which is not true, by which the said Bayard and Pettit is enabled to keep the subscriber out of his money for about three months longer, and the said Bayard has meanly attempted to prevent others from paying the subscriber about two thousand five hundred dollars, but in this mean and dirty action he was disappointed; I, therefore, do publicly declare that Andrew Bayard is a liar, a rascal, and a coward, and do offer two and a half per cent. to any good person or persons to insure the solvency of the said Bayard and Pettit for about four months from this date. Philadelphia, September 8, 1802. Thomas Passmore."

A rule to show cause was obtained to show cause why an attachment should not issue against the defendant founded on this publication.

Moses Levy, on behalf of Passmore, on the return of this rule contended that there were several matters in the obnoxious publication which had no relation to the suit in court, and that it must appear from the face of publication that there was a manifest allusion to a *lis pendens*. At most it was only calculated to influence the minds of the judges.

McKean and Dallas, on the contrary, insisted that there could be no doubt in reference to the allusion contained in the paper. One suit only was then depending between the parties. To the oath filed in the action by Bayard, the publication must necessarily relate; and it made no difference if its tendency was to influence the court rather than the jury. The sole apology

for the conduct of Passmore which is offered, is the assertion that Bayard has perjured himself by swearing to that which was not true.

The Court decided that the attachment should issue. The implication is irresistible that the publication referred to the suit then under the cognizance of the court. It was an attempt to prejudice the public mind in a cause then depending, and was, in the eye of the law, a contempt of the court.

The defendant then gave security for his appearance, and submitted to answer interrogatories. After his answers thereto and appearance in court toward the end of the term, *Levy*, in his behalf, contended that he passed the right of palliating his conduct as he had done in his answers to the interrogatories, and to extenuate his offense by every means in his power. The interrogatories were administered to him for the better information of the court, with respect to the circumstances of the contempt: 4 Bl. Com. 287.

Dallas, for the prosecution, urged that each step taken by the defendant was but an aggravation of his first offense in his effort to palliate his conduct; however innocent his intentions were, the justice of the country and of the court requires that he shall be punished: 2 Ves. 521; 1 Dall. 328; *Respublica v. Oswald*, 1 Am. Dec. 246; Wallace C. C. 78; Mosel. 250; Vern. & Scriv. 295, 296, 299.

SHIPPEN, C. J. However libelous the publication complained of may be, we have no cognizance of it in this summary mode, unless it be a contempt of the court: 2 Atk. 469. But we are unanimously of opinion that in point of law it is such a contempt, and readily concur with Lord Hardwicke that "there cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their characters:" Id. 471. If the minds of the public can be prejudiced by such improper publications before a cause is heard, justice cannot be administered. The defendant has set at naught the advice we gave him when we ordered the attachment. He has made no atonement whatever to the person whom he has so deeply injured, and he can only blame himself for the consequences.

The judgment of the court is that the defendant pay a fine of fifty dollars to the commonwealth, and be imprisoned in the debtors' apartment for the space of thirty days, and afterward until the fine and costs are paid.

This case and that of *Respublica v. Oswald*, 1 Am. Dec. 248, are noticed in a late decision in Illinois: *People v. Wilson*, 64 Ill. 195; S. C. 16 Am. Rep. 528. This gives an elaborate review of the authorities on the question of contempt. McAllister, J., in a concurring opinion, thus referred to the principal case: "The authority to punish for constructive contempts has been recognized by numerous courts in England and America. I shall merely cite a few of these cases: *Respublica v. Passmore*, 3 Yeates, 441; *Oswald's case*, 1 Dall. 319; *People v. Freer*, 1 Caines, 515; *Tenney's case*, 3 Fost. (N. H.) 162; *Hollingsworth v. Duane*, Wall. C. C. 77; *United States v. Duane*, Id. 102.

"In *Tenney's case* the respondent was interested in a suit brought by his son against one of the defendants in a bill of equity, in which suit the son was unsuccessful, but he was not a party to and had no interest in the suit in equity, and while the bill was pending, he caused copies thereof to be printed and circulated extensively. The bill contained serious charges, and the respondent also said that he could stop the proceedings in equity if one thousand dollars were paid to him. The conduct and language were out of the presence of the court, and it was held to be a contempt, and calculated to disturb the free course of justice. In conclusion the court said: 'The circulation of such charges in the absence of proof, by a person unconnected with the questions to be tried, was dishonorable and vindictive in the highest degree, and an unwarrantable interference with the administration of justice.'

"In *Respublica v. Passmore*, the defendant affixed a writing to a board in the exchange room in the city tavern, reflecting upon the parties to the suit, and the court held that the publication of such a paper prejudiced the public mind in a cause depending in court, and was a contempt.

"In *Oswald's case*, the publication in a newspaper of wanton aspersions upon the character of the opposite party, was ruled to be a contempt, and Chief Justice McKean said, that without the power to punish for contempts no court could possibly exist—'Nay, that no contempt could, indeed, be committed against us, we should be so truly contemptible.'

"In the case of *The People v. Freer*, *supra*, a publication was made in a newspaper in regard to a cause under investigation, and was intended to prejudice the public mind against the court, and to intimidate it in its decision, on the motion for a new trial in the case of *The People v. Crosswell*. Kent, J., afterward Chancellor, delivered the opinion of the court, and said that publications scandalizing the courts, or intending unduly to influence or overawe their deliberations, were contempts, which should be punished by attachment; and that it was essential to their dignity of character, their utility and independence, that they should possess and exercise such authority.

"In *United States v. Duane*, there was a publication in a newspaper, pending the cause, reflecting upon the court and jury. The court held that it was a contempt which had a tendency to deter counsel and intimidate the court, if they were susceptible of intimidation."

HERSH v. RINGWALT.

[3 YEATES, 508.]

PROOF OF SLANDER.—It is sufficient if the plaintiff proves that the defendant spoke words substantially the same as those laid in the declaration, and the precise words need not be proved.

JUSTIFICATION.—If one assert a slander generally without stating his author, it is actionable; but if he mentions at the time his authority, it should be such an authority as would induce reasonable belief.

DAMAGE.—If no special damage is laid, proof of particular damage will not be received.

ACTION of slander for saying that plaintiff had committed homicide and was in jail on that account. Plea, not guilty, with liberty to give the special matter in evidence.

It appeared that the plaintiff was of irreproachable character; that the alleged slanderous words had been repeated by five or six persons before the defendant uttered them; that defendant, at the time of using the words in a public inn, had said he heard them from two persons whose names he mentioned, one of whom verified this assertion at the trial; that there was no ill-will between the parties, and defendant had seemed concerned on hearing the report, and was not desirous of spreading it. A witness was offered at the trial to prove that a traveler refused to go to plaintiff's inn on account of the report, and said so at the time of the refusal. But the court rejected the testimony as *res inter alias acta* and because no special damage had been alleged.

O. Smith and Montgomery, for the defendant, objected that all the words spoken had not been laid in the declaration, and contended that it was a good plea in bar of the action, that defendant had only related a common report and mentioned at the time the person from whom he heard it: *Davis v. Lewis*, 7 T. R. 17.

Hopkins and Bowie, for the plaintiff, insisted that it was not lawful to repeat slanderous words: 12 Co. 133, 134; that it made no difference whether the words were heard from another or not: *Gardiner v. Atwater*, Say. 265; 4 Bac. Ab. 510; that every person was answerable for the slander he reported of another: Bull. 10. As to the words laid it is necessary only to prove the substance of them: Bull. 5.

BY COURT. It is sufficient if the substantial slanderous words are laid and proved. Otherwise the consequence necessarily

would be that if a conversation wherein slander was uttered continued for an hour, the whole must be distinctly expressed in the declaration and proved in evidence, which would be idle and superfluous.

The case of *Davis v. Lewis*, is sound law founded on the common usage of mankind and adapted to the common concerns of life: 1 Rol. Ab. 64, pl. 20; 1 Comy. Dig. 202; 4 Bac. Ab. 509; 1 Rol. Rep. 69; 1 Lev. 82; Cro. Jac. 91; 2 East, 436. If one asserts a slander generally without adding who told it to him, it is actionable. But if he would shelter himself under the cover of report it must be such a one as would induce reasonable belief. If it should appear to be the mere vehicle of malice, or the party should attempt to vindicate himself under an author wholly unworthy of credit, we should deem it an aggravation of the injury by a substitution of *finesse in fraudem legis*. In the present instance the defendant said he heard the report from two persons he named, but he has shown but one of them, and therefore he is not within the true spirit of the case cited in his defense. Yet the case is not of an aggravated kind; there was no ill-blood between the parties, and he was not industrious in circulating the report.

Verdict for the defendant.

See Townsend on Libel and Slander, sec. 210, citing this case, as to how far one is justified in repeating defamatory matter. This case will be instructive in connection with *Cook v. Barkley*, ante, 343.

RUNKLE v. MEYER.

[3 YEATES, 518.]

LIBEL—MITIGATION OF DAMAGES.—In an action for libel against the printer of a newspaper, it is not a justification in law that the publication was made at the instance of a person whose name was given at the time and who paid for it in the usual course of business, though it may go in mitigation of damages.

ACTION for libel. Plea, not guilty, with leave to justify. It appeared that the defendants, printers, published in the York Gazette, at the instance of George Gregor, by name, an article reflecting upon the plaintiff, a clergyman, and charging him, among other things, “with having got a cudgeling in Virginia from an inhabitant whom he persuaded that it was not right to sleep every night with his wife; that she lay alone, and

Runkle took the opportunity and came into her room; that the wife gave her husband a sign, and he apprehended him in his roguery and beat him his skin full."

Hopkins and W. Ross, for the defendant, contended that printing presses would not be free, according to the provisions of the constitution, if printers could be punished for a publication inserted at the instance of a person whom they named in the paper, and who paid for it in the usual course of business: Constitution Penn. art. 9, sec. 7. That libel was slander written or printed: 2 Esp. Dig. 240; and giving the author at the time of repeating slanderous words was good as a plea in justification to an action of slander: 7 T. R. 17; 12 Co. 133-4; *Hersh v. Ringwalt* (*ante*, 392). Plaintiff should look to Gregor who avows the publication.

Bowie and C. Smith, for the plaintiff.

The Court, in their charge to the jury, observed that the insertion of the publication at the instance of Gregor did not amount to a justification, in point of law, though it might go in mitigation of damages: 2 Atk. 472; 8 Mod. 123. Slanderous words and libels are not measured by the same rules in courts of justice. The offense of a libel is more heinous, as its circulation of the slander is more extensive, and derives, too, an additional degree of malignity from its being done premeditatedly: 2 Esp. Dig. 240; 1 Dall. 324 (*Republica v. Oswald*, 1 Am. Dec. 246); 2 East, 430. Its excuse rests not on the common infirmity of mankind. It is the mark of a depraved and wicked heart. Any written or printed words which render a man ridiculous or throw contumely on him, are actionable. But it is otherwise of words spoken; and this distinction has been long settled: 2 Wils. 403-4; Fitzgib. 121, 253-4; B. & P. 331. The law adapts itself to the usages and habits of mankind, but it cannot be expected to administer to foul malevolence; and hence, in the case cited, wherein the party was charged, in a copy of verses, with having the itch, a difference obtained between a libel and words spoken. Our reading does not furnish us with a *dictum*, much less a solemn adjudication, that a printer is justifiable in disseminating libelous papers, though he has received a pecuniary compensation therefor in the way of business. But we know that the English judges have laid it down, that writing the copy of a libel is writing of a libel; and if the law were otherwise, men might write copies and print them with impunity: 2 Salk. 417, 419. It will not

be denied that if one designedly bespatters another's clothes with filth as he passes the street, though at the instigation of a third person, he would be liable for damages. And shall a printer with his types blacken the fairest reputation, the choicest jewel we enjoy, and go scot free, merely because he has told the world that the paper is inserted at the request of G. G.? It is true that there are shades of guilt in this offense, and that the author is more criminal than the printer. The one prepares the poison with malice aforethought, the other administers it to the world. Some instances occur where the prosecution against the printer has been stopped, on the author being given up, or avowing himself, but this only shows that the latter is deemed the greater offender, and the printer may show this in allegation: 8 Mod. 123; Fortesque, 201; 2 Atk. 472. We do not know what difficulties may be interposed in the plaintiff's way in a suit at Fredericktown. The minds of the congregation may have been much heated in the acrimonious dispute which has subsisted between him and the German clergyman of the same persuasion. It is not necessary in an action for a libel to prove express malice; if it be slanderous, malice is implied: 1 T. R. 111. That the present publication against a clergyman is libelous, no one can doubt.

What has been called the liberty of the press, 1 Dall. 330 (*Respublica v. Oswald*, 1 Am. Dec. 246), is much misunderstood; and the most erroneous opinions have been formed of the state constitution in this particular. The seventh section of the ninth article of that instrument has provided, that "in prosecutions for the publication of papers, investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence. Every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." Indictment for libels against individuals, where the matter published is improper for public examination, remain in their former state, and the truth thereof cannot be given in evidence. In civil actions, at the suit of persons, either in a public or private capacity, the party is answerable in damages, if he cannot verify the charges he has made. This is the present case, and the plaintiff is entitled to a verdict. Of the measure of damages, the jury are the sole judges, under the mass of evidence submitted to their consideration.

Verdict for plaintiff for eight dollars damages and costs.

A reference to the case of *Runkle v. Winemiller*, 1 Am. Dec. 411. will enable us to understand the controversy out of which this case arose; and to which the court made reference.

HARTLEY'S LESSEE v. M'ANULTY.

[4 YEARS, 93.]

CONSIDERATION IN DEED.—A deed, in the body of which no consideration is expressed, but subjoined to which is a receipt by the grantor of “two hundred and fifty specie in full of the consideration money,” is sufficient to pass the land.

A point had been reserved at the trial of the cause, upon which the justices proceeded to give their opinions.

YEATES, J. This cause was tried on the sixth of October, 1803, and the plaintiff obtained a verdict for ninety-five and one-quarter acres in Fannet township. He claimed under a sale by the sheriff, who seized and sold the same as the property of Alexander Moore. At the trial, a point was made and reserved for further consideration, whether the deed from Robert Karr, the patentee, to Alexander Moore, dated fifth April, 1787, passed any estate to the grantee. No consideration was expressed in the body of the deed; but a receipt was subjoined thereto, whereby the grantor acknowledged that “he had received from the grantee two hundred and fifty in specie, in full of the consideration money.”

The general rule of law unquestionably is that to raise a use by the execution of a deed, there must be either a good or valuable consideration; as marriage, the payment of money, etc. By a bargain and sale on a general consideration, no use is raised: 1 Co. 176 a; Park. 553. A bargain and sale for divers good causes and considerations, without any money, is not good, though it be recited that the bargainee was bound by recognizance by the bargainer: Cro. Eliz. 394. And it has been held that the consideration of old acquaintance, or of being chamber-fellows, will not raise a use: 2 Rol. Ab. 783, pl. 5, 6. But it is equally clear that there is no indispensable necessity that the consideration money should be contained in the deed itself. Because a bargain and sale, without expressing any consideration, may be helped out by the averment that money was paid: 1 Keb. 12; 2 Inst. 672; 1 Co. 176; 7 Id. 39 a, 40 b; 11 Id. 24; 2 Rol. Ab. 786, pl. 1; 2 Mod. 250; 1 Leon. 170; Moore, 570. If no consideration is mentioned in a

deed, you may enter into proof of considerations: 3 T. R. 474; but if any consideration is mentioned and not said for other considerations, you cannot prove any other: 1 Ves. 127; 2 Wms. 804. A consideration will arise equally where a person gives up a certain pecuniary advantage at the time of the grant, as when a sum of money is actually paid down: 2 Atk. 154. The consideration of deeds is not to be weighed in too nice scales: Id. 514. The quantum of a valuable consideration in a deed is not regarded in law: Id. 148; 2 Vent. 85; Barnard, 384; 22 Vin. 202, pl. 2. In purchases, the question is not whether the consideration be adequate, but whether it be valuable, without fraud, within the statutes of Elizabeth: Finch's Rep. 104; 2 Chan. Ca. 159. And therefore it has been determined that the consideration of a pepper-corn is good to raise an use to make a tenant to the præcipe: 1 Mod. 262; 2 Id. 249; 2 Vent. 85. Indeed it has been said that a deed, from its solemnity, imports a consideration: 1 Fonb. 335; 3 Burr. 1663.

How, then, stands the case before the court? Here is a receipt from Karr to Moore, for two hundred and fifty specie. We know not what were the two hundred and fifty, whether eagles, half-eagles, dollars, cents or dimes; but this we know: that they were specie, and we also know, from the resolves of congress during the revolutionary war with Great Britain, that specie, in its true signification, means hard money, gold or silver, as opposed to the paper continental and state bills of credit which the necessities of the times gave birth to. It then means something valuable, as the word coin in the English books, and of whatever value the two hundred and fifty were, whether little or great, the word specie intrinsically imports a value. This, then, brings it to the case in 2 Rol. Ab. 785, pl. 2. If one, in consideration of a certain sum of money, bargains and sells lands, this is a good consideration to raise a use, without averment of any sum in certain; for the quantity of the sum is not material. It is a good sale if there be any money: Moore, 878. The deed in question, therefore, passed an interest in the lands of Alexander Moore, and was recorded. Even considered as a voluntary deed, it was good as between the parties. And the lands having been taken in execution as the property of Moore, are well passed by the sheriff's deed to the purchaser. And consequently my opinion is that judgment be entered for the plaintiff.

SMITH, J. A deed, or other grant, made without any consideration, is, as it were, of no effect; for it is construed to inure

to be effectual only to the use of the grantor himself: 2 Bl. 296, cites Perk. 533. A bargain and sale is not good if no consideration be alleged, not so much as *pro quadam pecunie summa*: T. Raym. 201; 7 Vin. 421, pl. 10. But upon the issue of *non concessit*, the want of setting it forth is cured by verdict; for it shall be intended to be proved on the trial: 1 Vent. 108; 1 Lev. 308. If a man pleads a bargain and sale, in which no consideration of money is expressed, it must be averred that it was for money, and the words for divers considerations, shall not be intended for money without averment: 7 Vin. 421, pl. 3, cites Moore, 569; 2 Rol. Ab. 786; 1 Co. 176. Though no valuable consideration be expressed in the indenture, yet if any were given, the same may be averred, and the land does sufficiently pass: 4 Int. 672; 7 Vin. 421, pl. 4. If the deed expressed for a competent sum of money, though the certainty of the sum be not expressed, it is good enough; for, against this express mention of the deed, no averment nor evidence shall be admitted: 7 Vin. 421, pl. 3; 1 Bac. 277; Moore, 378, 569. If one bargain and sell lands in consideration of a certain sum of money, it is sufficient to raise an use: 2 Rol. Ab. 786.

The act of third April, 1781, directs that all debts, contracts, etc., shall be liquidated by a scale, by reducing them to the true value in specie. The creditor shall recover the true value of his debt reduced to specie: 1 St. Laws, 880, 882. Another act of twenty-first June, 1781, declares that congress, etc., have been necessitated, by reason of the scarcity of specie, to emit large sums of paper money, etc., and the quantity of specie being of late considerably increased within the United States, that congress have recommended the repeal of all laws making paper bills of credit equal to gold and silver: 1 St. Laws, 902. See also sections 12, 14, 15 and 16 of the same act. In the resolves of congress of twenty-second May, 1781, the terms real efficient money, that is to say, in silver and gold, specie value, solid coin, are all used as synonymous: Id. 7 May. Specie value is used in the same sense.

The principles and rules of the common law as now universally known and understood, are so strong against fraud in every shape, that the common law would have attained every object proposed by 13 Eliz. c. 5, relating to creditors only, and by 27 Eliz. relating to purchasers: Cowp. 434; 1 Bac. Suppl. 582. Whether a transaction be fair or fraudulent, is often a question of law; it is the judgment of law upon facts and intents: 1 Burr. 474, 497; 1 Bl. Rep. 196. Nothing is so silly as fraud: Lofft,

53. All statutes against fraud shall be liberally and beneficially expounded, to suppress the fraud: 3 Co. 82; 5 Id. 60, 77; 1 Atk. 205; Cowp. 434. The common law doth so abhor fraud and covin, that all acts as well judicial as others, and which of themselves are just and lawful, yet being mixed with fraud and deceit, are in judgment of law wrongful and unlawful: 3 Co. 78; 1 Burr. 395; 2 Inst. 213, 215. There is no instance, where the original contract is fraudulent, that any subsequent act can purge it: 1 Wils. 323.

If A., seised of land in fee, maketh a fraudulent conveyance, to the intent to defraud purchasers, against stat. 27 Eliz., and continueth in possession, and is reputed owner; B. entereth into a communication with A. for the purchase of it, and by accident B. hath notice of this fraudulent conveyance, and yet concludes with A., B. shall avoid the fraudulent conveyance, notwithstanding his notice: 5 Co. 61 6, per Wray, C. J. A voluntary conveyance is binding on the party, and all claiming under him: 1 Fonb. 264, 270; Cro. Jac. 270. A., indebted in one hundred pounds, made a deed of his goods for twenty pounds, though the deed is void against all creditors by 13 Eliz., yet against the party, his executors and administrators, it remains a good deed: Yelv. 197; Cro. Jac. 270; 13 Co. 82; Cro. Eliz. 445; 13 Vin. 517, pl. 3, 554; 2 Bac. Ab. 605. Although a purchaser for valuable consideration within 27 Eliz., hath notice of a fraudulent conveyance before he purchases, yet after the purchase he shall avoid it; for the statute expressly avoids such conveyances; so that, whether the purchaser hath notice of them or not, is not material: *Gooch's case*, 5 Co. 60 b.

Supported by the foregoing authorities, I am of opinion: 1. That the deed from Karr to Moore is sufficient to convey the land; the consideration being stated in the receipt is as good in law as if it had been mentioned in the body of the deed: 2 Atk. 202; 2. The word specie has become technical in the United States, and by the acts of the legislature of Pennsylvania it is synonymous with gold and silver, real efficient money, solid coin or current money. The receipt in this case is for two hundred and fifty specie, or suppose two hundred and fifty to be omitted for specie, i. e. for solid coin "in full consideration for the above land." These words are just of the same force and effect as "for a competent sum of money," or in consideration "of a certain sum of money," which have been held sufficient; 3. Had the deed from Karr to Moore been made *bona fide* and for a valuable consideration, the estate would

have vested in Moore, and been liable to his debts. If, as was stated by the defendants' counsel, it was made by Karr, "to the end, purpose and intent to delay, hinder or defraud creditors," etc., it shall be deemed and taken only as against such creditors to be clearly and utterly void by Stat. 13 Eliz. c. 5. Yet, as against Karr, his executors and administrators, it is a good deed, and consequently the land so conveyed was liable to Moore's debts; 4. Whether the lessor of the plaintiff had notice before he bought, though not before his judgment, is not material, as has been the settled law ever since the decision of *Gooch's case* and *Stander's case*, therein cited: 5 Co. 60 b.

I concur that judgment be entered for the plaintiff.

BROWN v. GIRARD.

[4 YEATES, 115; S. C. 1 BERRY, 40.]

MARINE PROTEST EVIDENCE.—A protest made in Philadelphia, where both the insurer and insured resided, and without notice to the insured, was held to be evidence in an action between those parties to show the necessity of a deviation.

BURDEN OF PROOF AS TO SEAWORTHINESS.—A vessel insured must be in all respects fit for the trade wherein she is employed; and generally the proof lies on the insured; but where it appears that the loss may be fairly imputed to sea damage or other misfortune, the proof lies on the insurer, if he defends himself on the ground of unseaworthiness.

ACTION on two policies of insurance; the one on the goods laden on board the schooner *Eagle*, at and from Edenton, North Carolina, to Cape Nichola Mole; the other on the schooner. The cause now came before the court for a second trial.

The plaintiff offered in evidence the captain's protest, taken in Philadelphia ten days after the execution of the policies, to prove that the vessel was forced by winds and weather into that port.

Ingersoll and Rawle, on behalf of the defendant, objected. They contended that it was this deviation that released the underwriters: Park, 385. The captain should have proceeded to his destination without delay: Abbot, 193, 194; he is answerable for all negligence: Weak, 179; and by this protest he seeks to excuse himself under pretense of a storm. He is in fact giving evidence in his own cause. In a question on a policy on goods as to the seaworthiness of the vessel, the owner of the

ship was rejected as a witness to prove that she was staunch, until released by the plaintiff: *Peake Ni. Pri.* 84.

Condy, for the plaintiff, urged that the masters' protests had always been received as evidence in our courts in commercial transactions: 1 *Dall*, 6, 10, 318. Strict rules of legal evidence do not apply to causes of this nature: *Id.* 17.

By COURT. Let the protest be read and be judged of by the jury, agreeably to the uniform practice. We considered this matter very fully, on the motion for the new trial, and adhere to the opinion we then delivered. The usage is founded on the convenience of trade and is attended with salutary effects. If the defendant's doctrine prevails, few losses will be recovered on policies of insurance.

The protest, wherein the mate and a seaman had joined, was read; from which it appeared, that after leaving Edenton on the fourth June, 1797, the vessel struck on a bar. A leak was caused thereby, and was afterward, on the eighth June, so increased by a severe gale of wind, that the ship was forced into Philadelphia, the nearest port. The schooner was, on the fourth August, captured by a French privateer, carried into Port de Paix and there condemned for illicit trading, as Cape Nichola Mole was a revolted colony from France and in a state of siege.

The defendant then rested his defense on the unseaworthiness of the vessel, and offered in evidence a warrant from the United States district court of Pennsylvania, dated June 22, 1797, to two persons to make a survey of the schooner, and their return thereon.

Plaintiff objected that the return upon a survey was only evidence to prove a condemnation, and could not be received to show that the vessel was not seaworthy: *Wright v. Bernard*, *Park*, 436.

By COURT. As records, the warrant and survey surely may be read. Their operation will be considered hereafter. The reports of the surveyors, made on the twenty-fourth of June, stated that, upon examination, they found the plank of the schooner much worm-eaten about the stem and stern and at the stern-post, and that her leaking was occasioned thereby, and not by running on Ocracock bar.

The counsel agreed that if it was established that the schooner was not seaworthy, the policy on the goods, as well as on the vessel, was thereby annulled: *Park*, 249, 263.

The Court submitted the question as one of fact for the decision of the jury; and laid down the rule to be, that the vessel insured must in all respects be fit for the trade wherein she is employed; and generally the proof lay on the party insured; but if it appears that the loss may be fairly imputed to sea damage, or any other unforeseen misfortune, and the underwriter means to defend himself on the ground of her not being seaworthy at the time of her departure, the burden of the proof lies on him who sets it up as a defence: 2 Marsh. 367, 368.

Verdict for the plaintiff.

A motion for a new trial, on the ground that the verdict was against evidence, was denied.

It was also decided in *Crousillat v. Ball*, ante, 375, that the protest of the captain or master was admissible as evidence.

RESPUBLICA v. DENNIE.

[4 YEATES, 267.]

LIBEL—PRIVILEGED PUBLICATION.—The publication of the truth from good motives and for justifiable ends, though it reflect on the government or its magistrates, does not constitute a libel; but it is otherwise when done with an evil intent.

INDICTMENT for a libel. The facts sufficiently appear in the charge to the jury.

McKean, attorney-general, for the plaintiff.

Ingersoll and Hopkinson, for the defendant.

Before the jury were sworn defendant's counsel stated that they had received information that some of the jurors had publicly expressed their opinions on the present publication, and moved the court to question them whether they had so declared themselves or not: *John Fries' case*, Printed Trial, 177; *Lord Balmerino's case*, 1 St. Tri. 470, 471. The motion was opposed by the attorney-general.

The Court refused to put the question to the jurors; but they publicly declared that if any of the jurors in the box did not feel themselves indifferent to the defendant, or had prejudged the cause, or had so declared themselves, it was their duty to mention it to the court, to be judged of by them. It must be the wish of every honest mind that a fair and impartial trial should take place.

YEATES, J., delivered the charge to the jury: We possess no political characters on this bench; we are bound by every tie of religion and duty to see that the laws of the country shall be the rule of conduct, and that justice shall flow in her usual and accustomed channels without respect to persons.

The defendant stands indicted as a factious and seditious person of a wicked mind, and unquiet and turbulent disposition and conversation, seditiously, maliciously and willfully intending, as much as in him lay, to bring into contempt and hatred the independence of the United States, the constitution of this commonwealth and of the United States, to excite popular discontent and dissatisfaction against the scheme of polity instituted, and upon trial in the said United States, and in the said commonwealth, to molest, disturb and destroy the peace and tranquillity of the said United States and of the said commonwealth, to condemn the principles of the revolution, and revile, depreciate and scandalize the characters of the revolutionary patriots and statesmen, to endanger, subvert, and totally destroy the republican constitutions and free governments of the said United States and this commonwealth, to involve the said United States and this commonwealth in civil war, desolation, and anarchy, and to procure by art and force a radical change and alteration in the principles and forms of the said constitutions and governments, without the free will, wish and concurrence of the people of the said United States and this commonwealth respectively, and to fulfill, perfect and bring to effect his wicked, seditious and detestable intentions aforesaid, he, the said Joseph Dennie, on the twenty-third of April, 1803, at the city of Philadelphia, falsely, maliciously, factiously, and seditiously did make, compose, write, and publish the following libel, to wit: "A democracy is scarcely tolerable at any period of national history. Its omens are always sinister, and its powers are unpropitious. With all the lights of experience blazing before our eyes, it is impossible not to discover the futility of this form of government. It was weak and wicked at Athens, it was bad in Sparta, and worse in Rome. It has been tried in France, and terminated in despotism. It was tried in England, and rejected with the utmost loathing and abhorrence. It is on its trial here, and its issue will be civil war, desolation and anarchy. No wise man but discerns its imperfections; no good man but shudders at its miseries; no honest man but proclaims its fraud, and no brave man but draws his sword against its force. The institution of a scheme of polity

so radically contemptible and vicious, is a memorable example of what the villainy of some men can devise, the folly of others receive, and both establish, in despite of reason, reflection and sensation."

This publication is stated to have been made in a certain weekly paper, called the Port-folio, and the act is charged in the indictment to have been committed "in manifest contempt of the constitution and laws of the United States and this commonwealth, in derogation of the national independence, reputation and honor, to the evil example of all other in the like case offending, and against the peace and dignity of the commonwealth of Pennsylvania."

Is the defendant guilty or not of the facts and intentions charged, is the question to be tried. The case is admitted to be of high moment. The seventh section of the ninth article of the constitution of the state must be our guide upon this occasion; it forms the solemn compact between the people and the three branches of the government, the legislative, executive and judicial powers. Neither of them can exceed the limits prescribed to them respectively. To this exposition of the public will every branch of the common law, and of our municipal acts of assembly, must conform; and if incompatible therewith, they must yield and give way. Judicial decisions cannot weigh against it when repugnant thereto. It runs thus: "The printing presses shall be free to every person who undertakes to examine the proceedings of the legislature, or any branch of government; and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man; and every citizen may freely speak, write or print on any subject, being responsible for the abuse of that liberty. In prosecutions for the publication of papers, investigating the official conduct of officers or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence; and in all indictments for libels, the jury shall have a right to determine the law and the facts, under the direction of the court, as in other cases."

Thus it is evident that legislative acts, or of any branch of the government, are open to public discussion; and every citizen may fully speak, write or print on any subject, but is accountable for the abuse of that privilege. There shall be no licenses of the press. Publish as you please in the first instance without control; but you are answerable both to the community

and the individual, if you proceed to unwarrantable lengths. No alteration is hereby made in the law as to private men, affected by injurious publications, unless the discussion be proper for public information. "But if one uses the weapon of truth wantonly, for disturbing the peace of families, he is guilty of libel:" Per General Hamilton in *Crosswell's trial*, p. 70. The matter published is not proper for public information. The common weal is not interested in such a communication except to suppress it. What is the meaning of the words "being responsible for the abuse of that liberty," if the jury are interdicted from deciding on the case? Who else can constitutionally decide on it? The expressions relate to and pervade every part of the sentence. The objection, that the determinations of juries may vary at different times, arising from their different political opinions, proves too much. The same matter may be objected against them, when party spirit runs high, in other criminal prosecutions. But we have no other constitutional mode of decision pointed out to us, and we are bound to use the method prescribed.

It is no infraction of the law to publish temperate investigations of the nature and forms of government. The day is long past, since Algernon Sidney's celebrated treatise on government, cited on this trial, was considered as a treasonable libel. The enlightened advocates of representative republican government pride themselves in the reflection that the more deeply their system is examined, the more fully will the judgments of honest men be satisfied that it is the most conducive to the safety and happiness of a free people. "Such matters are proper for public information." But there is a marked and evident distinction between such publications and those which are plainly accompanied with a criminal intent, deliberately designed to unloosen the social bond of union, totally to unhinge the minds of the citizens, and to produce popular discontent with the exercise of power by the known constituted authorities. The latter writings are subversive of all government and good order. "The liberty of the press consists in publishing the truth, from good and justifiable ends, though it reflects on government or on magistrates:" Per General Hamilton in *Crosswell's trial*, p. 63, 64. It disseminates political knowledge, and by adding to the common stock of freedom, gives a just confidence to every individual. But the malicious publications which I have reprobated, infect insidiously the public mind with a subtle poison, and produce the most mischievous and alarm-

ing consequences, by their tendency to anarchy, sedition and civil war. We cannot, consistently with our official duty, pronounce such conduct dispunishable. We believe that it is not justified by the words or meaning of our constitution. It is true, it may not be easy in every instance to draw the exact distinguishing line. To the jury it peculiarly belongs to decide on the intent and object of the writing. It is their duty to judge candidly and fairly, leaning to the favorable side where the criminal intent is not clearly and evidently ascertained.

It remains, therefore, under our most careful consideration of the ninth article of the constitution, for the jury to divest themselves of all political prejudices, if any such they have, and dispassionately to examine the publication in the Portfolio, which is the ground of the present prosecution. They must decide on their oaths, as they will answer to God and their country, whether the defendant, as a factious and seditious person, with the criminal intentions imputed to him, in order to accomplish the objects stated in the indictment, did make and publish the writings in question. Should they find the charges laid against him in the indictment to be well founded, they are bound to find him guilty. They must judge for themselves on the plain import of the words, without any forced or strained construction of the meaning of the author or editor, and determine on the correctness of the innuendoes. To every word they will assign its natural sense, but will collect the true intention from the context, the whole piece. They will accurately weigh the probabilities of the charge against a literary man. Consequences they will wholly disregard, but firmly discharge their duty. Representative republican governments stand on immovable bases, which cannot be shaken by theoretical systems; yet, if the consciences of the jury shall be clearly satisfied that the publication was seditiously, maliciously and willfully aimed at the independence of the United States, the constitution thereof, or of this state, they should convict the defendant. If, on the other hand, the production was honestly meant to inform the public mind, and warn them against supposed dangers in society, though the subject may have been treated erroneously; or that the censures on democracy were bestowed on pure unmixed democracy, where the people *en masse* execute the sovereign power without the medium of their representatives (agreeably to our forms of government), as have occurred at different times in Athens, Sparta, Rome, France and England, then, however the judgments of the jury may

incline them to think individually, they should acquit the defendant. In the first instance, the act would be criminal; in the last, it would be innocent. If the jury should doubt of the criminal intention, then also the law pronounces that they should be acquitted: 4 Burr. 2552, per Lord Mansfield.

Thus have we endeavored to discharge our official duty to the jury with impartiality. It rests with them to discharge their duties virtuously and conscientiously, agreeably to the true spirit of our constitution and laws.

Verdict, not guilty.

GEISS v. ODENHEIMER.

[4 YEATES, 278.]

TIME OF EXECUTION OF DEED.—The real time of the execution of a deed may be shown by parol testimony by either party.

BURDEN OF PROOF.—When a deed is antedated, the party claiming under it has the burden of proof as to the time of its execution.

SCIRE FACIAS on a mortgage dated seventeenth December, 1801, by one Walter to the plaintiffs, to secure the payment of eight hundred dollars and interest, on the seventeenth June, 1802, acknowledged eighteenth December, 1801, and recorded the next day. Walter conveyed the premises to Odenheimer by deed dated twentieth July, 1801 (but which was admitted to be antedated), acknowledged eighteenth December, 1801, and recorded twenty-seventh April, 1802, and Odenheimer was substituted as defendant, under the plea of payment, with leave to give the special matter in evidence. The only question was whether the mortgage or deed was first executed.

Rawle, for the defendant, called the subscribing witnesses to the deed to prove the time of its execution.

M. Levy, for the plaintiff, objected that every deed is presumed to be executed on the day it bears date: 2 Inst. 674; and that six months having elapsed from the date of the deed in question before it was recorded, no estate was conveyed thereby: Act of 1715, sec. 8.

TILGHMAN, C. J.* The very authority in 2 Inst. 674, shows

*In the month of December, 1805, Chief Justice Shippen resigned his office. On the twenty-fifth February, 1806, William Tilghman was commissioned as chief justice of the supreme court. In a work on "The Leaders of the Old Bar of Philadelphia," by Horace Binney, he says, p. 13, referring to Edward Tilghman, one of the leaders of that bar: "The chief justiceship of the supreme court of Pennsylvania was offered to him by Governor McKean, upon the death (?) of Chief Justice Shippen; but he declined it, and recommended for the appointment his kinsman (cousin), William Tilghman, who so much adorned that station by his learning and virtues."

that the real time of delivery of a deed may be shown in evidence. The date shall be intended the time of delivery, unless the contrary is proved; the presumption stands until it is removed by testimony. It would be of the most dangerous consequence to assert that the dates of deeds are conclusive; the greatest frauds might thus be committed. If the true time of execution may be proved by one party, so may it by the other. The eighth section of the recording act of 1715 has been always confined to mortgages and defeasible deeds; a different construction would overthrow many titles. The supplement thereto has varied the expressions, but furnishes a strong legislative exposition of the former act. The deeds and conveyances are to be recorded within six months after their execution. We have no doubt but the evidence is strictly legal, and must be received.

YEATES, J. It has been determined in this court, on solemn argument, in *Burk v. Allen*, that the eighth section of the act of 1715 does not extend to deeds in general.

The witnesses were examined, but could not establish the time of execution of the deed. But from the deposition of Walter it appeared that the mortgage was first executed, and his testimony was corroborated by several circumstances.

TILGHMAN, C. J., submitted to the jury that if they believed the testimony of Walter, the plaintiff must prevail. But if they should doubt his credibility, and believe that the deed was executed on the seventeenth December, the day of its acknowledgment, still it was incumbent on the grantee to establish its execution prior to that of the mortgage. The deed being confessedly antedated, the burden of proof was thrown on the defendant.

Verdict for the plaintiffs.

SHERMAN'S LESSEE v. DILL.

[4 YEATES, 295.]

CONTRACT FOR SALE OF LAND.—By articles of agreement for the sale of land, it was agreed that on certain payments at a future day, the vendee should receive a deed; and further stated that for the consideration therein expressed, the vendor "grants, bargains and sells" a certain tract of land. Bonds were given for the purchase money. It was held that this was not sufficient to divest the legal estate.

EJECTMENT for two hundred and sixty-four acres of land.

The facts appeared as follows: Jacob Sherman, claiming the lands in question, on the seventeenth of December, 1792, entered into articles of agreement with George Fridley, stating that, in consideration of nine hundred and fifty pounds, to be paid as hereafter set forth, the said Sherman "grants, bargains and sells" to the said Fridley, his heirs and assigns, a certain tract of land containing two hundred and sixty-four acres, or thereabout. Fridley was to pay the money therefor, in the following manner, to-wit: One hundred and fifty pounds on March 1, 1793, and to assign to Sherman at the same time a bond of one Titler, conditioned for the payment of one hundred pounds on the first of April, 1795, with interest; sixty pounds on the first of March, 1795, and the residue in yearly sums of sixty pounds, for which Fridley was to give his bonds. On making the first payment, and assigning Titler's bond, and giving the bonds for the annual payments, Sherman agreed to convey to Fridley the land in question, and give as good and clear a right and title as Sherman had for the same.

The bonds were given, and Fridley received possession. Afterward he sold one hundred acres of the premises to his brother, and on the twenty-ninth of March, 1794, agreed to sell the remaining one hundred and sixty-four acres to John Caruthers and Thomas Dill, and their heirs, for seven hundred pounds, receiving from them bonds for the unpaid purchase money. Sherman afterward commenced his action against George Fridley for the one hundred and fifty pounds, payable March 1, 1793, which cause came on for trial in April, 1800. The defense was defective title, and that the warranty was only special. Sherman thereupon filed with the clerk a deed of the land with general warranty, and judgment was given in his favor. Upon an execution issued, the lands in question were sold to George Sherman, the plaintiff's lessor, on the twenty-second of August, 1801, and a deed duly executed on the twenty-third of April, 1803.

Bowie and Watts, for the defendant, contended her possession could not be disturbed, as Caruthers and Dill had performed all that was incumbent on them under the agreement with Geo. Fridley; and offered evidence to this point, insisting that the words in the present tense vested an estate in fee in Fridley, and that the covenant to convey at a future time did not derogate from the actual conveyance. The sheriff's deed could convey only the interest of the party for whose debt the land was sold at or before the taking thereof in execution: 1 Dall. St. Laws 70, sec. 4.

Duncan, Hopkins and Clark, for the plaintiff, argued that no actual grant was intended by the articles of agreement; that no deed was to be executed until the payment of the one hundred and fifty pounds and the assigning of Titler's bond. It was upon a judgment recovered in an action for this very two hundred and fifty pounds that the land was sold. Words of present contract with an agreement that the lessee should take immediate possession, though the lease is to be executed at a future day, operate only as an agreement for a lease, and not as lease itself: 1 T. R. 755; *S. P. Doe ex. dem. Coore v. Clare*, 2 T. R. 739.

By COURT. The admissibility of the testimony offered depends solely on the legal operation of the articles of agreement between Jacob Sherman and George Fridley. If the former conveyed thereby his legal interest in the land to the latter, then the evidence should be received; because when the vendee had fairly contracted with others, his remaining interest in the land was subject to be sold by the sheriff for his debts, and not the right he had parted with. In every agreement the intention of the parties is to be considered: Plowd. 290, 292; 3 Burr. 1477. And it is said, 4 T. R. 335, there is no rule of law so reluctant that it will not recede from words to enforce the meaning of the parties: 1 Atk. 8. If the intention is clear that an estate should pass, courts will construe deeds in support of that intention different from the formal nature of those deeds; and on the other hand an instrument for the sale of lands has been construed as an agreement to convey, though it contained words in the present tense, or "do sell" and "deliver," because it accorded with the meaning of the parties. The present case bears a strong analogy to *Stouffer's Lessee v. Coleman*, which was determined at Lancaster on great argument at *nisi prius*. There bonds had been given by the vendee which were prosecuted to judgment. As to the contract made with Caruthers and Dill, it is stated therein that the lands are held under Jacob Sherman; and it is fully settled that whatever is sufficient to put the party upon an inquiry is good notice in equity: 2 Fonb. 255. The true intention of the contracting parties cannot be mistaken. The payment of the one hundred and fifty pounds and the assignment of the one hundred pounds were to precede the making over the land by a sufficient deed of conveyance; and the performance of those acts was postponed until the first of March, 1793. We cannot therefore hesitate to say that the legal title continued in Jacob Sherman until those acts were done, and

that the equitable interest alone vested in George Fridley under the agreement according to the true intent thereof. This legal title was divested out of Sherman by his deed executed under the recommendation of this court, containing a clause of general warranty; and the judgment entered in the suit immediately attached on the lands. Consequently, the lessor of the plaintiff becoming the vendee of the sheriff, the legal and equitable interest in the premises, independently of all sales or contracts made by George Fridley at any period subsequent to the execution of the original articles, became vested in him by operation of law. The result is that the testimony must be overruled.

ENGLES v. BRUINGTON.

[4 YEATES, 345.]

PROOF OF HANDWRITING OF SUBSCRIBING WITNESS.—If a subscribing witness to a will be beyond the jurisdiction of the court, his handwriting may be proved as if he were dead.

FEIGNED issue to try the validity of the will of Amelia Sennet, dated August 8, 1801, to which testatrix was said to have affixed her mark. There were two witnesses to the instrument, Edward J. Coale and Robert Taylor.

Taylor testified that he had been sent for by Mrs. Sennet to draw her will, but, being indisposed, recommended Coale, who drew the will according to her directions; that the will was signed and published in their presence, and they subscribed their names as witnesses. It was admitted that Coale had removed to Baltimore, Maryland, since the filing of the will in the register's office.

Condy and Hopkinson, on behalf of the plaintiffs, offered to prove Coale's handwriting.

S. Levy and Meredith, for the defendant, objected that unless a subscribing witness to an instrument is dead, or cannot be found, he must be personally examined: 7 T. R. 265, 266. Two witnesses are necessary to establish a will: 1 Dall. 286. A commission should issue to Baltimore to take Coale's deposition.

Plaintiffs' counsel replied that evidence of a witness' handwriting may be given when the witness is abroad: 1 Esp. 2. Where an attesting witness is beyond sea, the best evidence which can be obtained is proof of his handwriting: 1 B. & P.

861, per Buller, J. And it has been established that if a subscribing witness is out of the jurisdiction of the court, evidence of his handwriting is admissible: 2 East, 250.

By Court. Better evidence will not be demanded than is in the party's power to give. The supreme court has no power to oblige the register of wills to deliver out an original paper lodged with him for probate, to be carried into another state; nor has it any control over a witness out of its jurisdiction. I think it is doubted in one of the books, whether the same credit is to be given to the handwriting of a witness beyond sea, as if dead: Per Lord Hardwicke, 2 Ves. 460. But from the cases cited on the part of the plaintiffs, it appears, that where a subscribing witness to a deed or other written instrument is beyond the reach of the process of the court, his handwriting may be proved as if he were dead: See Peake's Rep. 100. For this is all that can reasonably be expected from the party, under such circumstances. To attempt to prove a mark to a will would be idle and ridiculous.

The handwriting was fully proved, but it afterward appeared that the testatrix had married two husbands, viz: Edward Sennet, in 1791, and William Tully, in October, 1796, her first husband being then living. There being a strong presumption that Sennet was alive at the time of making the will, the jury found for the defendant, the husband of the deceased's sister.

MILES v. OLDFIELD.

[4 YEATES, 423.]

WORDS ACTIONABLE IN SLANDER.—The words "You are a vagrant," are actionable, as a statute subjects such a person, on a conviction before a justice of the peace, to imprisonment at hard labor, for a term not exceeding one month.

DEFECTS CURED BY VERDICT.—If a declaration contain a substantive cause of action, though informally set forth, it will be aided after verdict.

JOINDER OF CAUSES.—A charge of slander accompanied by a tortious act may be joined therewith in one count.

ERROR to the court of common pleas. The declaration set forth, that William Miles, the defendant below, with intent to injure the plaintiff and bring her into disgrace, did, on the twenty-eighth February, 1803, in the presence of several citizens, say to one Sheppard, a constable, of and concerning the

plaintiff: "She is a vagrant, and you must take her to Squire Hamilton, that he may send her to jail;" and did on the same day actually cause plaintiff to be arrested, and carried before Squire Hamilton, a justice of the peace; and that injury was sustained thereby in the sum of one thousand dollars.

A verdict was found for the plaintiff below for one hundred dollars damages and costs.

Sample, for the plaintiff in error. His grounds of error appear from the opinion of the court.

A. W. Foster, for the defendant, contended that case was the proper form of action where imprisonment of the plaintiff arises from the charges of the defendant: 2 T. R. 231. Slanderous words accompanied by a tortious act may be joined in law: Bull. N. P. 5, 11. The objections to the form come too late after verdict: Doug. 658; 1 Dall. 461. The declaration in the present case follows those in *Philips v. Fish*, 8 Mod. 37; and *Carter v. Fish*, 1 Str. 645, which were held good.

By Court, *TILGHMAN*, C. J. The errors alleged in this case are confined to what appears on the face of the declaration. The defendant's counsel has raised several ingenious objections to the judgment on this declaration, which may be reduced to the following heads:

1. That to call a person a vagrant is not actionable;
2. That if this is to be considered as an action of slander, the declaration is bad, in not laying the words to be false and malicious;
3. That the declaration does in substance contain two counts: one for slander, and the other for a malicious prosecution; and that the malicious prosecution is badly set forth, because it is not said that the prosecution is ended and the plaintiff acquitted.
 1. The act of twenty-first February, 1767, defines the nature of vagrancy, and authorizes a justice of the peace to commit vagrants to the common jail, there to be kept at hard labor for any time not exceeding one month. To charge a person with an offense which subjects him to punishment of this kind is, in the opinion of the court, actionable. The first objection, therefore, is of no validity;
 2. Many small faults in pleading are cured by verdict. The court is always strongly inclined to support judgments, after the merits have been tried. The rule of law is, that where the declaration contains a substantial cause of action, it shall be aided though defective in form. Considering the whole of

this declaration, it does sufficiently appear that the words spoken were false and malicious. It is said that the plaintiff was not a vagrant, and that the defendant knew this. It follows inevitably that when the defendant called her a vagrant he told a malicious falsehood;

3. To the third objection, the cases of *Philips v. Fish* and of *Carter v. Fish* are opposed. In the latter, wherein judgment was given, the plaintiff set forth that "the defendant said he had stolen a hen, by reason of the speaking of which false and slanderous words he was not only injured in his character, but by occasion thereof, and by the procurement of the defendant, he was taken up and carried before a justice," etc. The jury gave damages under forty shillings, and the only question was, whether the plaintiff should have full costs, it being an action of slander. The court were of opinion that full costs should be given; because the taking up and carrying before the justice was set forth as a distinct fact. In *Philips v. Fish*, wherein the cause of action was stated in the same way, the court inclined to the same opinion. It is true, the court are made to say, "in the principal case the action is founded on the words spoken; and the procuring the plaintiff to be arrested for felony is laid in a different count, and the defendant is found guilty generally," etc. By this, it must be meant that there were in substance two counts, or two causes of action included in one count; for in form there certainly was but one count; the case is not very accurately reported. But taking the case of *Carter v. Fish* to be law, as reported, it seems to be conclusive in favor of the plaintiff below, because there the very same objection might have been urged which the plaintiff in error insists on here, viz: that the declaration contained a count for a malicious prosecution, in which it was not alleged that the plaintiff was acquitted, and yet the court gave judgment for the plaintiff. We do not consider this as an action for a malicious prosecution: Vide T. R. 225. The declaration is rather irregular. It contains an action for slander, and also asserts that the defendant, by speaking the slanderous words, occasioned the plaintiff to be carried before a justice. It seems to be rather a special injury arising from the slander. But if, according to the case of *Carter v. Fish*, it is to be considered as a distinct cause of action, we will follow the authority of that case throughout, and support the judgment of the court below.

Judgment affirmed.

SHOCK v. McCHESNEY.

[4 YEATES, 507.]

MALICIOUS PROSECUTION.—An action of malicious prosecution will lie where the criminal prosecution was commenced, although no indictment was preferred.

SLANDER, WHEN ACTION WILL NOT LIE.—Slander will not lie for words charging a crime uttered before a justice of the peace, in consequence of which the plaintiff was bound over, but discharged without an indictment having been preferred.

AMENDMENT.—An amendment will not be allowed, which gives to the plaintiff a new substantive cause of action, and which may take from the defendant the right of pleading the statute of limitations; so the plaintiff will not have leave to change his action for slander into one for malicious prosecution.

MOTION for a new trial. An action of slander was tried before SMITH and YEATES, J J., and a verdict found for the plaintiff for fifty-five dollars. The cause of action was, charging the plaintiff, before a justice of the peace, with being guilty of forgery in erasing and altering the time of payment in a note payable to plaintiff. In pursuance of this accusation plaintiff was bound over to appear, and was discharged at a subsequent sessions, no indictment having been preferred against him. It did not appear that defendant had made the charges at any other time or place than before the justice.

Hopkins and Elder, for the defendant, contended in support of the motion, that no action would lie; that the law protects witnesses in criminal prosecutions and will not punish them for mistakes of judgment: 4 Co. 14, 15; 1 Saund. 131, 132; William's note, 2 Inst. 228. It would be a matter of public inconvenience if words spoken in the course of preferring a complaint against offenders should be deemed actionable: 3 Esp. 33, per Lord Eldon; 2 Burr. 807. If any action does lie against the defendant it must be one of malicious prosecution, wherein probable cause is a good defense: 3 Esp. 7; 3 Bl. Com. 126; and of this defense, defendant has been deprived by the nature of the action of slander. Malicious prosecution may lie though no indictment has been found: H. Bla. 78; and also, should the indictment be insufficient: Gibb. Rep. in Br. 185. Malicious prosecution has been sustained, though no indictment was preferred and the plaintiff was nonsuited: *Leigh v. Webb*, 3 Esp. 165.

Montgomery and Fisher, for the plaintiff, contended that malicious slander in the course of justice gives a cause of action.

Words maliciously spoken by counsel are actionable: Cro. Jac. 90, 91. Malice is to be presumed in the present case after verdict: 1 Lev. 119. An action for malicious prosecution will not lie upon a *nolle prosequi* on an indictment found: 1 Salk. 21; 6 Mod. 261; 2 Salk. 456; in that action plaintiff must aver that he was acquitted, discharged not being sufficient: 2 T. R. 231; he must procure a copy of the indictment and acquittal: 3 Bl. Com. 126; and show that the suit is at an end: Doug. 215.

YEATES, J. Neither Judge SMITH nor myself are ashamed to admit, that in the decision of this cause at *nisi prius*, we were mistaken in the principle which governed our opinion. We were misled by the authority in 2 T. R. 231, and the cases in 1 Salk. 21; 2 Id. 456, that malicious prosecution will not lie where an indictment has been found and a *nolle prosequi* entered. The law does not seem to discriminate accurately on this subject, when the prosecution shall be considered at an end. The case has been much more fully argued now; and we freely admit that from the new authorities which have been adduced by the defendant's counsel, the plaintiff has misconceived his suit, by bringing an action of slander, instead of malicious prosecution. In the latter case, the defendant would have had it in his power to show a probable cause of complaint to the justice for the supposed forgery, as a ground of defense to the civil action. By proceeding in an action of slander, the defendant was deprived of this right; and we are therefore of opinion that a new trial be awarded: See *Secor v. Babcock*, 3 John Rep. 204.

The other members of the court concurring, a new trial was granted.

Plaintiff's counsel then moved to amend their declaration by adding a count for malicious prosecution, under section 6 of the act of March 21, 1807: 7 St. Laws, 562. The court will grant leave to amend in penal actions where the amendment does not introduce any new substantive cause of action: 7 T. R. 155.

Defendant objected, on the ground of delay, and that the amendment would essentially alter the nature of the action, and take away the defendant's right to plead the statute of limitations.

By COURT. Here certainly has been delay, but it is said to be imputable to both parties. We have the power of amending at common law; but, by doing so in this instance, we give the plaintiff a distinct substantive ground of suit, which he

never contemplated before, and prevent his opponent from sheltering himself under the statute. This is wholly inadmissible. The clause was introduced into the arbitration act to prevent nonsuits for matters of form, and to bring the true merits of each case before the court, where the controversy remains the same.

The courts in Pennsylvania have particularly noticed this case on the point of amendment. On this it is cited in *Ekel v. Sneyly*, 3 Watts & S. 273; *Coxe v. Tilghman*, 1 Whar. 289; *Newlin v. Palmer*, 11 Serg. & R. 101, the court saying in the latter case: "If it were allowed to a party under the leave to amend to set out a new cause of action altogether, a single suit might be a business for life. The act was intended to correct matters of form standing in the way of the merits." In *Glass v. Stewart*, 10 Serg. & R. 225, it is said: "In *Shock v. McOhesney*, the distinction is taken between a mere speech which is slander, and the institution of a prosecution which is an action for malicious prosecution. Those actions depend on very different principles. In actions for words, the defendant cannot justify on the ground of probable cause, as he may where he had instituted a prosecution. Malice and the want of probable cause must concur in the last case; in the first, falsehood alone. Besides, by converting slander into conspiracy, the defendant is deprived of pleading the statute of limitations. In the one case, slander, the limitation is one year; in the other, conspiracy, or action for malicious prosecution, six years." On the same point it is cited in *Farmers' etc., Bank v. Israel*, 6 Serg. & R. 295; *Smith v. Rutherford*, 2 Id. 359; *Ebercoll v. Krug*, 5 Binn. 54.

MITCHELL v. SMITH.

[1 Binn. 110.]

CONTRACT VOID AS AGAINST PUBLIC POLICY.—A penalty inflicted by statute upon the commission of an act, implies a prohibition of it as an offense, so as to make a contract based on such act void; therefore, under an act affixing a penalty for acquiring title to lands in Pennsylvania, except in the mode specified, a contract for the purchase and sale of lands in Pennsylvania, under a Connecticut title, such being excluded by the act, is unlawful and void, and no action can be maintained on such contract.

Writ of error from the common pleas of Luzerne county, where Smith, the plaintiff below, brought an action of debt upon a sealed note, payable to Smith or order. It appeared that the note was given as the consideration for land in Luzerne county. The defendant was put in peaceable possession of the land and had so continued ever since. The defendant specially pleaded the invalidity of the contract, under an act of assembly which prohibited parties from acquiring land under titles other than those specified in the act.

A full statement of the facts of the case appears from the opinions rendered.

W. Tilghman and McKean for the plaintiff in error.

Rawle for the defendant in error.

SHIPPEN, C. J. This is a writ of error to reverse a judgment rendered in the court of common pleas for the county of Luzerne, in an action brought on a bill obligatory for the sum of four hundred and eighty-three dollars and thirty-three cents; to which the defendant pleaded payment, with leave to give special matter in evidence.

It appears on the record that the consideration for this bill was a tract of land conveyed by the plaintiff to the defendant, lying without the seventeen townships, in the county of Luzerne, and held by him under a deed from a committee of the Susquehanna company, under the Connecticut title, and not derived from the authority of this commonwealth, or of the late proprietors of Pennsylvania before the revolution. The principal question in the case is whether this be a legal or illegal consideration for the bill, and whether the contract for the sale and purchase of this land is a violation of the laws of this commonwealth, so tainting the whole transaction as that this court cannot legally afford their aid to carry the contract into execution. The mischiefs intended to be remedied by the act of eleventh April, 1795, were of a grievous nature. A warfare had been carried on between the claimants of land under the title of Connecticut and the claimants under Pennsylvania, for many years, and many lives had been lost in the contest. It was at length found necessary for congress to interpose. They thought fit to appoint judges or commissioners to decide upon the claims of the respective states, who, after a full and solemn hearing, made their decree at Trenton, establishing the right of government over the country in question to be in Pennsylvania, but without deciding the particular titles of individuals claiming the right of soil. Notwithstanding this decree, not only the old settlers, under the title of Connecticut, retained their possession, but a great number of new persons, under the same pretended title, intruded into this part of Pennsylvania and possessed themselves of and settled such vacant lands as they chose.

The legislature of Pennsylvania passed repeated acts of assembly to remedy the evils consequent upon such intrusions, some of them with a view to compromise with the first settlers.

All, however, proved ineffectual to prevent new illegal settlements. At length the act in question was passed, called the intrusion law. This act is of a public nature, and intended to remedy a public evil. The point relied upon by the plaintiff is that the land sold by the plaintiff, and purchased by the defendant, was fairly bought and sold, all the circumstances being fully known to both parties, and carried into execution on the part of the defendant, by his taking possession, and occupying the land; and that although the act of assembly imposes a penalty on the party offending, yet it nowhere invalidates the contract. On the part of the defendant it is contended that the contract which was the foundation of this obligation, having been made in violation of the good policy and direct provisions of the act of assembly, this court will not afford their aid to carry such a contract into execution.

What, then, was the contract? It appears to be a contract for selling and conveying a tract of land which the plaintiff held under a deed from the committee of the Susquehanna company; or, in other words, under a Connecticut title. What says the law? "If any person shall enter into possession of, or shall combine or conspire for the purpose of conveying, possessing, or settling on any lands within the ascertained limits, under color of any half share, right or pretended title not derived under the government, he shall forfeit," etc. Is not the actual conveying, possessing and settling this land direct evidence of combining for that purpose, and, of course, a direct violation of the law? But it is objected that where a law creates a new offense, and prescribes a specified mode of punishment, no other mode can be pursued. This is generally true where the act contains no prohibitory clause; in which case, the common law punishment by indictment might be inflicted, although the punishment directed by the act was by bill, plaint or information. Here, indeed, there is no general prohibitory clause, the act directing only that if any person shall do so and so, he shall be punished so and so. Is this, however, a case involving a double punishment by prosecution? All that is contended for is that the contract is illegal, being founded on a breach of the law, and of consequence a void contract, and cannot be enforced in a court of law. And for this purpose there cannot be a more express authority than the case in Carth. 252, where Lord Chief Justice Holt says: "That every contract made by or about a matter or thing which is prohibited, and made unlawful by any statute, is a void contract, though the statute it-

self doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are no prohibitory words in the statute." This authority, although perhaps it might not warrant a conclusion that a penalty implies a prohibition for the purpose of making the offense punishable by indictment, in case the law had prescribed another and a specific punishment for the offense, yet it certainly is an authority to prove that a contract, about a matter prohibited by statute is unlawful, and a void contract, although the act does not expressly say so, and that a penalty implies a prohibition, so as to make the contract void. The spirit of this law in *Carthew* has been followed up in numerous modern cases, particularly where goods have been purchased abroad with an intent to smuggle them into England. In these cases the seller of the goods, although a foreigner, residing in a foreign country, cannot recover the price of his goods in England, if he were any way concerned in the smuggling transaction; the whole contract being tainted and nullified by the illegal act, so as to prevent the recovery of the debt in the country whose laws were violated.

I would barely add, that if we could enforce the payment of the consideration money for this land, we must likewise have been obliged, on the other hand, to enforce the delivery of the possession, in case the money had been paid and possession refused, which clearly would have been a most glaring infraction of the law; the remedies must be mutual or not at all. This subject has been lately canvassed in this court, in the case of *Maybin v. Coulon*, where we were compelled to resist the payment of an otherwise honest demand, on account of its being founded on and connected with a breach of the laws of trade, in covering the property of a foreigner, by using the name of a citizen of the United States in obtaining the register of a ship.

For these reasons, I am of opinion the judgment below must be reversed.

YEATES, J. Whether this case be considered on principle or precedent, I am of opinion that the judgment of the common pleas cannot be supported.

Courts of justice sit to carry into execution, dispassionately, the general will of the community disclosed by the laws. It would seem a solecism in jurisprudence, that a contract, which necessarily leads to defeat the provisions of an act of the legislature of the highest public concernment, should receive judi-

cial sanction and support. The single bill on which the action is founded, is dated eleventh of March, 1796, and, therefore, the laws in force at that time only can affect our determination. The intrusion act was passed on the eleventh of April, 1795. The bill of exceptions states that a deed bearing equal date with the single bill, was executed by the defendant in error to the plaintiff, for one thousand five hundred acres of land in Smithfield township, in the county of Luzerne, which the former claimed by a grant of the committee of the Susquehanna company, out of the seventeen townships; that both parties went together to view the lands previous to the execution of the bill or deed, and that the plaintiff in error was put in possession, and continued therein since the time of the contract. It is evident, therefore, that the agreement was entered into in direct violation of the intrusion act, for the purpose of conveying, possessing and settling the lands interdicted, under a half share right or pretended title, not derived from the authority of this commonwealth, or of the late proprietaries. It openly attacked the sovereignty of the state over a considerable part of the lands clearly comprised within her chartered limits.

In *Booth et al. v. Hodgson et al.*, 6 T. R. 409, Lord Chief Justice Kenyon observes that "it is a maxim in our law, that the plaintiff must show that he stands on a fair ground when he calls on a court of justice to administer relief to him." And in *Jaques v. Withey and Reid*, 1 H. Bl. 67, it is said by counsel, and seemingly assented to by the court, that "where an action is in affirmance of an illegal contract, and the object of it is to enforce the performance of an engagement prohibited by law, clearly such an action was in no case to be maintained." And Lord Chief Justice Ellenborough, in the late case of *Edgar et al. v. Fowler*, in 1803, has said: "We will not assist an illegal transaction in any respect; we leave the matter as we find it, and then the maxim applies, *melior est conditio possidentis*:" 3 East. 225. A broad ground is laid down by Lord Chief Justice Holt in *Bartlett v. Vinor*, Carth. 252, in these words: "Every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." If the law is correctly laid down in these authorities, I run little hazard in asserting that the suit of the plaintiff in the common pleas cannot be supported.

It cannot be denied that contracts which violate the rules of decency or morality, or oppose principles of sound policy of the country, are illegal and void. The cases cited on the part of the plaintiff in error fully prove the positions. So also of contracts which immediately tend to defeat the legislative provisions for the security and peace of the community, though not made void by statutes. Thus, in *Biggs v. Lawrence*, 3 T. R. 454, a contract for goods to be smuggled into England was held invalid; and it is there said that one who seeks redress in a court of law, must not show that he broke the laws of his country. In *Clugas v. Penaluna*, 4 T. R. 466, it was resolved that an inhabitant of Guernsey cannot recover in England for goods sold there, if intended to be smuggled into England. It was held immoral to evade the laws of the country, though the act was done in Guernsey, and though the contract might be legal in Guernsey and enforced there. In *Waymell v. Reed et al.*, 1 T. R. 599, a vendor of goods abroad shall not recover the value of goods packed up in order to be smuggled into England; for even foreigners shall not be allowed to subvert the revenue laws. In *Mitchell et al. v. Cockburne*, 2 H. Bl. 379, A. and B. were engaged in a partnership in insuring ships, etc., which was carried on in the name of A., and A. paid the whole of the losses; such a partnership being illegal by the statute of 6 Geo. 1, c. 18, A. could not maintain an action against B. to recover a share of the money that had been so paid; because no contract arising directly out of such an illegal proceeding could be the foundation of an action. In the case before cited, *Booth et al. v. Hodgson*, 6 T. R. 405, A. B. and C. became partners in insuring ships, contrary to the said statute of 6 Geo. 1, c. 18, sec. 12, but it was agreed that the policies should be underwritten in the name of A. only. Several policies were effected, and the premiums received by C. and D., and it was held that A. could not recover against C. and D. And in *Camden v. Anderson*, 6 T. R. 730, a policy effected in contravention of a statute made for the purpose of protecting the monopoly granted to the East India company, was held void. Courts will not enforce contracts injurious to and against the public good: Per C. J., 2 Wils. 348. Many contracts which are not against morality are still void as being against the maxims of sound policy: Per Lord Mansfield, Cowp. 39; and again in the same book, p. 343, his lordship uses the following expressions: "The objection that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the de-

fendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy which the defendant has the advantage of, contrary to the real justice as between him and the plaintiff, by accident, if I may say so. The principle of public policy is this, *ex dolo malo non oritur actio*. No court will lend its aid to a man who founds his cause of action upon an immoral or illegal act, if from the plaintiff's own stating or otherwise. If the cause of action appears to arise *ex turpi causa*, or the transgression of a positive law of this country, there, the court says, he has no right to be assisted. It is upon this ground the court goes, not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. Where both are equally in the wrong, *potior est conditio defendentis*." These observations afford a decisive answer to part of the ingenious arguments of the defendant's counsel.

But it is further objected that most, if not all of the cases relied on, either respect offenses prohibited at common law, or such as had been heretofore created by statute, and particularly smuggling transactions, which the courts were extremely jealous of, as they defrauded the royal revenue. It was said that the act of sixth April, 1802, 5 St. Laws, 198, was made to supply the very deficiency which existed before, and which was now attempted to be supplied by a judicial decision; for section fourth vacates such contracts as the present, and the act did not take effect till the first May, 1802. I answer that it would be no great stride, in my idea, to maintain that after the decree at Trenton, the sales of titles within the limits of Pennsylvania, under the grants of a sister state not recognized by our laws, would be indictable on the principles of the common law. Such acts are immediate attacks on the sovereignty of this state, tend to violences of the most alarming nature, and are public evil examples. But supposing it to be otherwise, and that the authorities in the English books related merely to smuggling transactions, though the fact is contrary, I take it that the same grounds of decision which influenced the courts in England to determine such contracts to be invalid, would equally operate on our minds to declare the same as to agreements which ultimately affect the public peace and national prosperity. In both cases the subject-matter is of great magnitude. The public revenue is endangered and affected. Individuals are defrauded. Why should we not be as tenacious as British judges in instances of public revenue being defrauded, tending to infrac-

tions of the peace, and where the very acts of contracting are express denials of the right of the people over a large portion of the state? It was candidly admitted during the argument that the deed, of which the single bill in question was the consideration, vested no right or interest whatever in the grantee. I will only add that the subject of a contract ought to be such a thing as men have a lawful right and power of stipulating about at pleasure: 1 Pow. Cont. 164. The law, by forbidding an act, takes from the contractor the power of obliging himself to do it, and consequently prevents the person contracting from gaining any right of requiring it to be done: Id. 165. A contract or agreement is unlawful if it be to encourage unlawful acts or omissions: Id. 195. On the whole, I am of opinion the judgment in the common pleas be reversed.

SMITH, J., concurred.

BRACKENRIDGE, J. The consideration of the bill in question is the giving possession and the sale of a tract of land under a title derived from what is called the Susquehanna company. This claim is founded on the principle that the land is without the charter boundary of Pennsylvania. Hence it is adverse to the claim of this state both as to soil and jurisdiction. It is true the mouth of the claimant paramount, the state of Connecticut, from whom the company derive their claim, is shut by a decision; but this does not conclude the possessor as to right of soil, nor in fact will it conclude his exertions as to jurisdiction. The very object of the sale is to induce settlers, and increase strength to support vexatiously the claim in the courts of the United States, or by force, independent of law. Shall the courts of the state be called upon to enforce contracts and assist combinations against herself? Exercising jurisdiction, the state is bound to preserve the peace and aid contracts, but not such as militate against her own rights. It would be unnatural, and against reason, which is a ground of the common law. It is against public policy. Self-preservation forbids it. So that, independent of any act of the legislature, I must hold the transfer illegal, and the obligation given under such consideration void.

Judgment reversed.

Writers on contracts do not fail to notice this case, when treating of void contracts. It is thus noticed in 1 Parsons, 458; 1 Story, section 615. The language of Parsons on this head is: "Where the consideration is altogether illegal, it is insufficient to sustain a promise, and the agreement is wholly

void. This is so equally whether the law which is violated be statute law or common law. It has been held in England that where a statute provided a penalty for an act, without prohibiting the act in express terms, there the penalty was the only legal consequence of a violation of the law, and a contract which implied or required such violation was nevertheless valid. But Lord Holt denied the doctrine; and Sir James Mansfield established a better rule of law, holding that, where a statute provides a penalty for an act, this is a prohibition of the act. We apprehend that this has always been the prevailing, if not the uncontradicted, rule of law on this subject in this country."

SIMPSON'S LESSEE v. AMMONS.

[1 BINGH, 175.]

SEVERANCE OF JOINT-TENANCY.—A mortgage executed by two out of three joint-tenants is a severance of the joint-tenancy.

EJECTMENT. The facts appear from the opinion of the court.

Riddle, for the plaintiff.

Addison, for the defendants.

By Court, **TILGHMAN, C. J.** This case comes before the court on a case stated for their opinion. Baynton, Wharton and Morgan, being seised in fee-simple as joint-tenants of the land in question, a mortgage was executed by Baynton and Morgan, and by Baynton for Wharton, to Benjamin Marshall; but Baynton had no authority to execute the mortgage in the name of Wharton. The administrators of Marshall, who is dead, assigned this mortgage to the lessor of the plaintiff, who also obtained a conveyance of the whole land from Morgan since the death of Baynton and Wharton. On this case two points arise: First. Whether the joint-tenancy was severed by the mortgage; Secondly. Whether the assignee of the administrators of a mortgage can support an ejectment in his own name.

As to the first, the court are of opinion that the mortgage was a severance of the joint-tenancy. The interest of Baynton and Morgan passed by it, but the interest of Wharton was not affected.

As to the second point, the legal estate in the two-thirds conveyed to Marshall descended on his death to his heirs. But the mortgage being in effect only a security for a debt due to the estate of Marshall, his heirs were trustees for the benefit of the administrators, who were entitled to the debt. It was determined in the case of *Kennedy v. Fury*, 1 Dall. 72, that *cestui que trust* may support an ejectment in his own name.

This decision is founded on the peculiar situation of Pennsylvania, where there is no court of chancery, to prevent inconveniences which might arise from the obstinacy of trustees, who might refuse to assist in the recovery of lands. It appears to us that the case before us falls within the same principle. The equitable interest of the mortgage is completely vested in the lessor of the plaintiff, and no third person can be affected by his recovery in this ejectment. We are of opinion, therefore, that he may recover; but as the interest of Wharton is not vested in him, he can recover but two-thirds of the land for which the action is brought.

M'MILLAN v. BIRCH.

[1 BERRY, 178.]

WORDS ACTIONABLE.—To call a clergyman a drunkard is actionable, because these words, if believed, must deprive him of that respect, veneration and confidence, without which he can expect no hearers as a minister of the gospel.

WORDS, WHEN PRIVILEGED.—Words spoken of the plaintiff before a presbytery of the presbyterian church in the course of his defense against charges for which he had been summoned there by the plaintiff, are not actionable, provided he does not designedly and maliciously wander from the point for the purpose of slander.

Writ of error from the circuit court of Washington county. Birch, the plaintiff below, brought an action of slander against McMillan for calling plaintiff “a liar, a drunkard, and a preacher of the devil.” The declaration stated that plaintiff was “a man of learning, integrity and piety, and that for twenty-eight years last past he had been and then was a minister of the gospel in the presbyterian church, and had taken upon himself the orders of the same;” and laid as special damages in consequence of the slander that plaintiff was refused admission into the presbytery of Huntingdon. Pleas, not guilty, act of limitation, and justification.

It appeared in evidence that plaintiff was a presbyterian minister regularly ordained in Ireland; that he came to the United States in 1798, preached for a time in Philadelphia and then removed to Washington county; that plaintiff afterward called the defendant, who was also a presbyterian clergyman, before the Ohio presbytery for slander and unchristian threatenings; that the presbytery acquitted the defendant of the charges

against him except for calling plaintiff "a preacher of the devil," for which they reprimanded him and he submitted; that the words laid in the declaration were spoken by defendant while making his defense before the presbytery. It also appeared that plaintiff never had been in union with the presbyterian church of the United States so as to be authorized to preach as one of its ministers; and that plaintiff's application for admission to the Huntingdon presbytery had been rejected.

The cause was heard before YEATES and SMITH, JJ, in October, 1804, and a verdict found for the plaintiff. The exceptions taken appear from the opinion rendered.

Ross and Addison, for plaintiff in error.

Mountain, for defendant.

TILGHMAN, C. J. The bill of exceptions contains two points: 1. That upon the evidence given the action could not be maintained by the plaintiff, for words spoken of him in his profession of a minister of the presbyterian church; 2. That the words spoken by the defendant, while making his defense before the Ohio presbytery, against the charge exhibited against him by the plaintiff for slander, were not actionable. On both these points the court charged in favor of the plaintiff.

In arguing the cause before us the counsel for the plaintiff in error made four points which it will be necessary to consider: 1. That the words are not actionable, applied to persons in general; 2. That they are not actionable when applied to the plaintiff on the evidence in this cause; 3. That exclusion from the Huntingdon presbytery is no temporal damage, nor such as the law will take any notice of, or suffer damages to be recovered for; 4. That the words spoken by the defendant in his defense before the Ohio presbytery are not actionable.

1 and 2. Whether the words are actionable applied to persons in general, I think it unnecessary to decide, because I am clearly of opinion they are actionable as applied to the plaintiff. The reason why certain expressions are actionable when applied to persons of certain professions, is this, that from the nature of the case it is evident that damage must ensue. To say of a merchant that he is a bankrupt, or of a lawyer that he is a knave, must, if believed, necessarily produce damage. So to say of a clergyman that he is a drunkard, because these words, if believed, must deprive him of that respect, veneration and confidence without which he can expect no hearers as a minister of the gospel. Express authority has been produced to

show that these words are actionable, spoken of a clergyman in England. The defendant's counsel do not say that a character of a clergyman is less sacred or less worthy of protection here than in England, but they object that inasmuch as the plaintiff was never admitted to the rights of a presbyterian clergyman in the United States, he has failed in proving his case as stated in his *narratio*. But in answer to this it is to be remarked that he has not said he was a minister of the presbyterian church in the United States; he only says in general that he was a minister of that church, and so he undoubtedly was, for he was ordained in Ireland, and was never degraded from holy orders. He was what the presbyteries and general assembly in the United States call a foreign minister; and in that capacity he might, if he thought proper, preach and receive money for preaching, from any that chose to pay him, without the consent of any assembly or presbytery. Or if he proceeded in a regular way and obtained their consent, no new ordination would have been necessary; which is an incontestable proof that the church here recognizes an ordination in Ireland, as investing a clergyman completely with the order of the ministry. The plaintiff, therefore, was a minister of the presbyterian church; and the words spoken of him, if believed, must necessarily preclude him from any employment whereby he might obtain a living in the American church.

3. This point is not mentioned in the bill of exceptions. No objection was made to the charge of the court in this respect. I think it, therefore, immaterial. There can be no error in the record on account of special damages, because the words are actionable in themselves, and the law implies damage. Even supposing, for argument's sake, that the loss of admission into a presbytery was not a matter for which damages could be recovered (which, be it remembered, I by no means assert), it would be unwarrantable to suppose, after a verdict, that the jury had given damages on that account. Courts are always disposed to support, and not to destroy, the verdicts of juries.

4. I now come to the last point, the only one which is attended with any difficulty. It was raised suddenly in the course of the trial; it was new; and the judges who tried the cause, and who were obliged to declare their opinions in a short time, delivered the impression of their minds not without doubt. I have given it the attentive consideration it merits; and though I cannot but feel diffidence when I disagree with the respectable and learned gentlemen before whom the trial was had, I

will proceed to offer my reasons for thinking that the words spoken by the defendant, when making his defense before the presbytery, are not actionable.

I consider malice as an essential ingredient in slander. If I say of a man that he is a thief, or that he committed murder, the law implies malice in general; and it lies on me to show that there was no malice in my heart. This I may do in various ways. I may show that I used this expression when examined as a witness in a court of justice; or when I was concerned in a prosecution, as attorney for the commonwealth; and although I was mistaken in the fact, no action lies. The occasion of my speaking being called upon by others, and only acting in the course of my duty, preclude the idea of malice. So what is said by myself or my attorneys in my defense in a court of justice is not actionable; not only because of the occasion of my speaking, but also because the public good requires that every man should be allowed to speak freely in his own defense. It is the same with regard to what I say as plaintiff in an action; because there is as much reason why persons should enjoy freedom of complaint as freedom of defense. But if any man should abuse this privilege, and under pretense of pleading his cause, wander designedly from the point in question, and maliciously heap slander upon his adversary, I will not say that he is not responsible in an action at law. This freedom of speech in what is called a court of justice, is not confined to courts of common law. Cases have been cited to show that it is extended to proceedings in ecclesiastical courts, and proceedings before justices of the peace; and I have no doubt but that it should likewise be extended to proceedings before referees.

The objection in the case before us is, that presbyteries and general assemblies are not courts of justice. Certainly they are not; and depositions taken before them are no evidence in courts of justice, because they have no authority to administer an oath; and a person swearing falsely could not be indicted for perjury. But although they are not courts of justice, they are bodies enjoying certain rights, established by long custom, and not forbidden by any law. They can inflict no temporal punishment; and their jurisdiction is founded on the consent of the members of the church. No extensive church can preserve decency, good order, and purity of manners, without discipline. It serves to correct a multitude of evils, which cannot and ought not to be subject to temporal cognizance. It corrects them, too, in a manner the most mild, the most private, and the least scandalous

and injurious to religion, in a manner that may reform the offender without exposing him to the open scorn and ridicule of the world; circumstances which sometimes render men desperate. A jurisdiction of this kind, exercised only over those who consent to it, certainly must be productive of good effects; and it appears to me that the persons thus consenting and pleading their causes either in a course of complaint or defense, fall within the principle applied to those who are speaking in courts of justice. If they conduct themselves in a decent manner, the occasion of the speaking makes it improper that the law should imply malice. I repeat the remark made before, that if under a pretense of pleading a cause before a presbytery one should designedly and maliciously wander from the point and slander his opponent, he would be responsible for his conduct in a court of justice.

Let us apply these principles to the case before us. It was the plaintiff who first affirmed the jurisdiction of the presbytery and cited the defendant to answer before it. The defendant did not decline the jurisdiction. What then was he to do? He must either confess that the words he had spoken of the plaintiff were false, which, if he believed them to be true, would be a great crime, or by acknowledging that he had spoken them and endeavoring to justify them, render himself liable to an action in a court of law, which had been barred by the act of limitation; for this is the consequence, if words spoken there are actionable. Would these words have been spoken at that time, if the plaintiff had not extorted them? And after extorting them, shall he apply to a temporal court for damages? If the law is so, will not ecclesiastical jurisdictions prove traps for the unwary? May not the occasion of the defendant's speaking be fairly and candidly said to warrant the conclusion that he spoke not through malice, but in his own defense; or, at least, ought it not to form an exception from the general rule by which the law implies malice? The subject suggests a multitude of reflections; but I have said enough to explain the principles on which my opinion is founded. Whether the defendant will derive any advantage from it I know not; for it is very possible on a new trial there may be sufficient evidence to establish the plaintiff's action, independent of what passed before the presbytery. It is very possible that the verdict already given would have been the same if the court had charged on this point, according to the defendant's wishes. But be that as it may, he is entitled to the benefit of his exception. I am

of opinion that the charge of the circuit court was erroneous in the last point mentioned in the bill of exceptions; and, therefore, the judgment must be reversed.

BRACKENRIDGE, J., concurred.

Judgment reversed.

PRIVILEGED EXPRESSIONS.—To enable a party the more effectually and completely to prosecute his cause, or defend in a judicial proceeding, there is conceded to him an indulgence in the use of language, which, if used elsewhere, or on any other occasion, would subject him to an action for slander. This principle was early established and is now fully recognized. The rule is well stated in Townshend on Slander and Libel, section 221, that: "Whatever one may allege in his pleading, by way of defense to the charge brought against him, or by way of counter-charge, counter-claim or set-off, can never give a right of action for slander or libel." In a late case in Ohio, *Lanning v. Christy*, 30 Ohio St. 115, it is held that an action will not lie for statements contained in an answer alleged to be libelous, if such statements were honestly made without malice, and if they were relevant, believed by the defendant to be true, and were made upon probable cause and under advice of counsel.

As indorsing this doctrine, see *Hill v. Mills*, 9 N. H. 14; *Kidder v. Parkhurst*, 3 Allen, 393; *Watson v. Moore*, 2 Cush. 133. The doctrine is very clearly stated in New York with its limitations. In *Marsh v. Ellsworth*, 50 N. Y. 311, the court says: "The law is well settled that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such proceedings, reflecting injuriously upon others, when such words and writings are material and pertinent to the question involved; and that within such limit the protection is complete, irrespective of the motive with which they are used; but that such privilege does not extend to matter having no materiality or pertinency to such questions."

As a counsel stands for and in the place of his client, the same privilege is extended to him, but with the same restriction, but when he makes use of this opportunity to go outside of the case and make a slanderous attack upon a party, he is then no more privileged than any other person, and must be held liable for the words spoken: *Garr v. Selden*, 4 N. Y. 91; *Lea v. White*, 4 Sneed, 111; *Jennings v. Paine*, 4 Wis. 358; *Parker v. Mitchell*, 31 Barb. 469.

The fullest freedom in expression and commenting on the acts of parties, subject to the restriction that it shall be confined to the facts of the case, and the acts of the parties thereto has been claimed for counsel engaged in judicial proceedings in England. So early as the reign of James I, it was laid down in England "that a counselor hath a privilege to enforce anything which is informed unto him for his client, and to give it in evidence, it being pertinent to the matter in question, and not to examine whether it be true or false:" *Brook v. Montague*, Cro. Jac. 30. But a much broader rule was laid down in *Woods v. Gunston*, Styles, 462, decided in 1655, where it is said that "if a counsel speak scandalous words against one in defending his client's cause, an action lies not against him for so doing; for it is his duty to speak for his client, and it shall be intended to be spoken according to his client's instructions." This carries the privilege beyond what is now conceded.

A forcible illustration of the exemption and privilege of counsel in this respect appears in the case of *Hodgson v. Scarlett*, 1 B. & Ald. 223, which is a leading English case on this subject. The defendant, a distinguished leader of the bar, and afterward known as Lord Abinger, the chief baron of the court of exchequer, was sued for having used the following words, while acting as counsel in the trial of a cause: "Some actions are founded in folly, some in knavery, some in both, some in folly of the attorney, some in the knavery of the attorney, some in the folly and knavery of the parties themselves. Hodgson was the attorney of the parties, drew the promissory note, fraudulently got Bowman to pay into his hands one hundred and fifty pounds for the benefit of the plaintiff. This was one of the most profligate things I ever knew done by a professional man. Mr. Hodgson is a fraudulent and wicked attorney." The court all agreed that the action would not lie. Ellenborough, C. J., said: "A counsel entrusted with the interests of others, and speaking from their information for the sake of public convenience, is privileged in commenting fairly and *bona fide* on the circumstances of the case, and in making observations on the parties concerned, and their instruments or agents, in bringing the case into court. The defendant says that he is a fraudulent and wicked attorney. These are words not used at random and unnecessary, but were a comment upon the plaintiff's conduct as attorney. Perhaps they were too strong; it may have been too much to say that he was guilty of fraud as between man and man, and of wickedness *in foro divino*. The expression in the exercise of a candor fit to be adopted might have been spared. But still a counsel might *bona fide* think such an expression justifiable under the circumstances. It appears to me that the words spoken were uttered in the original cause, and were relevant and pertinent to it, and consequently that this action is not maintainable."

A late case in England fully applies the doctrine asserted in *Hodgson v. Scarlett*. This was a case in the court of exchequer, *Lewis v. Higgins*, 62 L. T. 98. The plaintiff had been a solicitor in certain proceedings, in the course of which a criminal prosecution was instituted and failed. Some time after, in an argument before one of the chancellors, the defendant, a distinguished equity lawyer, referring to the proceedings which the plaintiff had commenced, said: "Is not that putting a pistol to a man's head? Is not that more than any highway robbery, and more than any crime of the ordinary sort for which men are transported and convicted very day before magistrates and judges?" On the trial, after the opening speech for the plaintiff, Kelly, C. B., informed the counsel that he would receive evidence only on two points; first, whether the words were spoken; and secondly, on what occasion they were used, and then remarked: "I must tell the jury that the law of England forbids me to enter into any other questions in the case, and does not authorize them to enter into and determine, upon the merits of a case, affecting the character of a member of the bar, which depends entirely upon what has been stated by him in a cause legitimately before the judge in a court of justice. This has been held to be the law over and over again * * * I think it essential that you and the public should clearly understand that the privilege claimed by the defendant as applicable to this case is not that of counsel but the privilege of the people of England as represented by counsel. It is essential to the well being of the whole community that a counsel, when once engaged, should discharge his duty fearlessly without the shadow of a shade of apprehension as to the consequences." This privilege extends not merely to regular courts of justice, but to all investigations before magistrates, referees, municipal bodies,

and ecclesiastical judicatories: *Hoar v. Wood*, 3 Met. 193; *York v. Pease*, 2 Gray, 282; *Farnsworth v. Storrs*, 5 Cush. 412; *Mayo v. Sample*, 18 Iowa, 306; *Holt v. Parsons*, 23 Tex. 9; *Hastings v. Lusk*, 22 Wend. 410; *Milam v. Burnsides*, 1 Brev. 295; *Forbes v. Johnson*, 11 B. Mon. 48. But as the privilege is a personal one, a subsequent publication of a speech made by counsel in a cause, or the proceedings therein containing libelous matter, will be unlawful, because the reason of the privilege does not apply to the case: *Rex v. Abbingdon*, 1 Esp. 226; *Rex v. Creevey*, 1 M. & S. 273; *Flint v. Pike*, 6 Dow. & Ry. 528; *Respublica v. Oswald*, 1 Am. Dec. 246; *Commonwealth v. Blanding*, 3 Pick. 304; *King v. Root*, 4 Wend. 113.

FOX v. WILCOCKS.

[1 BERRY, 194.]

LIABILITY OF ADMINISTRATOR FOR INTEREST. — An administrator is liable for interest where he has been guilty of neglect in not putting out the money of the intestate, or has made use of it himself; and he is bound to show what has been done with the money to avoid the conclusion that he has made use of it; but he is not liable for interest until after twelve months from the death of his intestate.

APPEAL from the orphans' court of Philadelphia. The principal point in the case was whether an administrator is liable for interest on sums of money remaining in his hands before the settlement of his accounts, he having refused to produce to the auditors the bank-book of his administration, and to state on affirmation, what money, if any, belonging to the intestate, he had used for his own purposes. The facts appear from the opinion of the court.

C. J. Ingersoll, for the appellees, contended that administrators must pay interest for money of the estate, which they use themselves, or are negligent in not employing at all; and that it was a rule of chancery, that the administrator will be presumed to have used the money unless he states, under oath, what disposition has been made of it: *Hilliard v. Gorge*, 2 Chan. Ca. 285; *Ratcliff v. Graves*, 1 Vern. 196; *Landen v. Green*, Barnard. Ch. Rep. 389; *Attorney-general v. Corporation of Stafford*, Id. 86; *Lee v. Lee*, 2 Vern. 598; *Bird v. Lockey*, 2 Id. 744; *Wilkins v. Hunt*, 2 Atk. 151; *Newton v. Bennett*, 1 Bro. Ch. Rep. 359; *Treves v. Townsend*, Id. 884; *Littlehales, v. Gascoigne*, 3 Id. 74. The civil law adopts the same principle: *Denizart*, tit. Interêt, 11, 51, 53, 54; tit. Tuteur, 61, 62, 63, 69; 2 *Pothier de Bienf.* 86, 48, 49.

Lewis, for the appellant, replied that no presumption could arise in this case, as auditors had no authority to demand a com-

pliance with the notice to produce bank-books and make a statement; and that the cases cited apply only where the money has been kept a long time; that is, in case of fraud or gross negligence.

By Court, TILGHMAN, C. J. It appears that S. M. Fox, the acting administrator of W. B. Hockley, settling his administration accounts with the register, which were transmitted as usual to the orphans' court, by whom, with the consent of the said administrator and next of kin, the accounts were referred to auditors. On appearance before the auditors, there was no dispute concerning any item charged in the administration accounts; but the next of kin objected to the commissions allowed the administrator, and they claimed interest for sums of money which, they alleged, had remained a considerable time in his hands. The auditors were of opinion that the commissions allowed the administrator were reasonable, and that the administrator should be charged with one hundred and fifty pounds as a just and reasonable compensation for any use which he could or did make of the money remaining in his hands during the course of his administration; and they declared at the same time, that it did not appear that the administrator was ever unprepared to pay any money legally demanded of him. The next of kin and the administrator were both dissatisfied with this report. Both filed exceptions; and it was agreed that the report of the auditors should be confirmed by the orphans' court without prejudice to either party, in order to afford a ground for an appeal to this court, on which appeal every objection was to be heard that could under the exceptions filed have been made to the report of the auditors in the orphan's court. The next of kin excepted, that the administrator had large sums in his hands for a long time; that they called upon him to produce his bank-book before the auditors, and to answer, on oath, whether he had made use of any and how much money of the deceased, and for what length of time; both which he refused to do. That in consequence of this, they were entitled to interest on the sums which so lay in the hands of the administrator, but that the auditor refused to allow interest. The administrator excepted, that the auditors charged him with one hundred and fifty pounds interest, although they state that it did not appear that he was ever legally called upon for money on account of the estate, which he was not ready to pay.

What I consider as the principal point in the case is, whether

the administrator is liable to pay interest for the sums of money which from time to time remained in his hands before the settlement of his accounts. By the act of 1713, sec. 4. (a), it is enacted that "executors, administrators and guardians may, by leave and direction of the orphans' court, put out their minors' money to interest; but if no person can be found to take it who will give good security, they shall only be responsible for the principal." By the same law, sec. 6, "they shall only be liable to pay interest on the surplusage of the estate remaining in their hands when the accounts of their administration are or ought to be settled before the orphans' court or register. It is therefore the duty of executors, administrators and guardians, not to let money remain unemployed in their hands. And by fair implication from the words of this act of assembly, if they do through negligence suffer it to remain unemployed, they are responsible for interest; much more so if they use the money for their own purpose. As the law expressly declares that they are only liable to pay interest on the balance in their hands when the administration accounts are or ought to be settled, it should seem that they are not liable to interest during twelve months from the death of the intestate, since that period is reckoned reasonable for the settlement of those accounts.

To lay down rules by which it may be ascertained in every case whether administrators shall pay interest on balances in their hands is impossible; because every case depends on its own circumstances. But I think it may be established as a principle, that interest is payable where the administrator has been guilty of neglect in not putting out money, or where he has made use of it himself: *Granberry's Ex'rs v. Granberry*, 1 Wash. 246 [1 Am. Dec. 455]. Both the act of assembly and the principles of universal reason concur in this; and it is agreeable to the authorities cited from the law of England and the civil law. Still it remains to be decided by the facts in each case whether the principle is applicable. As to the auditors, no law has been shown which satisfies me that they have power to call for the oath of the administrator as to the use he has made of the money or to demand the production of his books. At the same time I cannot help remarking that the administrator should reflect well before he declines the offer of his adversary to appeal to his own books, because it lies on him to show what has been done with the money; and unless he does show it in a satisfactory manner he leaves himself open to the conclusion of having used it for his own purposes.

The court having given their opinion on the point of law submitted to them by the exceptions, it remains for the parties to determine whether they will acquiesce in the report of the auditors (men certainly of excellent character and experience in business), or proceed to a further investigation of the accounts.

YEATES and SMITH, JJ., were not present at the argument nor at the delivery of the opinion.

EBERT v. WOOD.

[1 BERRY, 216.]

PARTITION BY PAROL NOT WITHIN STATUTE OF FRAUDS.—A parol partition made between tenants in common, by marking a line of division on the ground, and followed by a corresponding separate possession, is good, and not within the statute of frauds.

WRIT of error from the common pleas of Fayette county. Wood, the plaintiff below, brought an action for partition against Ebert, to which he pleaded *non tenent insimul*. The plaintiff gave in evidence a deed from one John Lea to himself for an undivided moiety of the premises in question, and also another deed from Lea to Ebert for the other individual moiety. The defendant then offered testimony to prove that prior to the commencement of the suit, Wood and defendant agreed to make a partition, and accordingly met upon the ground; that with the assistance of a surveyor jointly employed by them, they distinctly marked a line of partition, and actually made a division of the land, by each taking possession of the part allotted to him by the other, which had been held in severalty ever since. This evidence was overruled, and a bill of exceptions was taken upon which the case came before the court.

Addison, for the plaintiff in error, contended that a partition by parol was good between the tenants in common when made upon the land: *Docton v. Priest*, Cro. Eliz. 95; and that a parol agreement concerning lands, partly executed, is good in equity: 1 Fonbl. 164, c. 3, sec. 8; as it was not then within the statute of frauds: 1 Pow. Cont. 300; *Earl of Aylesford's case*, 2 Str. 782.

Ross, for the defendant in error, insisted that a parol partition by tenants in common was not good at common law: 2 Bl. Com. 324; 4 Comy. Dig. 311; and that the statute of frauds re-

quired a deed to be made in all cases. At all events, the partition should have been specially pleaded.

By Court, TILGHMAN, C. J. [The facts as above stated were reviewed.] The defendant in error contends that the evidence ought not to have been admitted: 1. Because the partition was made by parol; 2. Because if it had been in writing, it was not admissible on the issue joined, but ought to have been specially pleaded. The first objection is founded on the act of assembly of twenty-first March, 1772, by which a writing is made necessary for the passing of any estate or interest in lands. This act of assembly, so far as respects the point under consideration, is, in substance, the same as the English statute of frauds and perjuries; in the construction of which it has been determined that specific execution of a parol agreement shall be decreed in equity where the agreement has been carried into effect in part only. This determination was founded on two principles: 1. That where the parties have acted upon their agreement, there is no danger of perjury in proving it; and, 2. Because it is against equity that a man should refuse to perfect an agreement from which he had derived benefit by an execution in part. Whether the courts of chancery have gone further than they ought, in thus indirectly giving efficacy to a parol agreement concerning land, we do not think ourselves at liberty now to inquire; because the principles I have mentioned have been adopted by this court, and long considered as the law of the land, and to question them now would shake many titles acquired under their authority. We therefore think ourselves bound to say that the evidence offered by Ebert ought to have been received, unless it was improper because not applicable to the issue joined, which is the second point for consideration.

The plaintiff below declared that he and the defendant held the land together and undivided; the defendant pleaded that they did not hold it together; and this was the point of the issue. Now what was the evidence offered by the defendant? Why, that he and the plaintiff had made partition, which was in direct affirmance of his plea that they did not hold together; because if they held in severalty they could not hold together. The court are of opinion, therefore, that the evidence offered by the defendant below ought to have been received, and that the judgment of the court of Fayette county was erroneous, and must be reversed.

Judgment reversed.

HAZARD v. ISRAEL.

[1 BINNEY, 240.]

WHEN SHERIFF A TRESPASSER.—If a deputy sheriff enter the house of an administrator to find goods of an intestate whereon to levy, and afterward proceed to levy on the goods of the administrator, from whom nothing is due, he is a trespasser *ab initio*.

LIABILITY OF SHERIFF FOR ACTS OF DEPUTY.—The sheriff's officers being his known and recognized deputies, he will therefore be held liable civilly for their misconduct in the execution of a writ.

EXEMPLARY DAMAGES AGAINST SHERIFF.—A jury may properly award exemplary damages against a sheriff for the misconduct of his deputy.

MOTION for a new trial in an action of trespass against Israel, the sheriff of Philadelphia county, to recover damages for the misconduct of his deputy in the execution of a *fi. fa.* The cause was tried before BRACKENRIDGE, J., at *nisi prius*, December, 1807, when the following facts appeared: One Lewis brought suit against Hazard and another, as administrators with the will annexed of Clarkson, and obtained judgment for a considerable sum, reserving the question of assets. Upon this judgment a *fi. fa.* issued for the debt, to be levied on the testator's goods, and seven pounds ten shillings costs to be levied in like manner if goods were found, otherwise *de bonis propriis* of the administrators. Before the execution issued the sheriff had agreed to charge the costs to the account of Reed, attorney for the administrators; and while the execution was in the hands of Suter, a deputy sheriff, he was informed by Reed that the costs had been paid. It was not pretended that the administrators had any of Clarkson's goods in their hands, at or since the issuing of the execution; nevertheless Suter went to plaintiff's house between ten and eleven o'clock at night, and in a rude and insolent manner levied on the furniture in the parlor to the amount of seven hundred or eight hundred dollars, to satisfy the debt and costs. Reed, who had been called in, objected to the levy, but Suter continued to make his inventory, and then left without removing any of the goods. The following day a motion was made to set aside the levy. Israel wrote to Hazard on the same day that the levy was rescinded, and made a return of the *fi. fa.* thus: "No goods of Clarkson whereon to levy, etc., and for default thereof levied on divers goods, etc., of Ebenezer Hazard, for the damages, which are since restored, as the amount of the said damages were previously secured to me, and my bailiff, when the said levy was made, was not informed thereof."

The jury found for the plaintiff, seven hundred and fifty dollars damages. Whereupon a motion for a new trial was made on the grounds that the verdict was against law and evidence, and the damages excessive.

Condy and Ross, for the defendant, in support of the motion urged: 1. That Suter was not a trespasser; he had a right to levy for the costs which had been secured but not paid; and he was entitled to enter plaintiff's house to look for Clarkson's property; 2. That defendant was not liable for the acts of Suter, no warrant to the latter having been produced: *Drake v. Sykes*, 7 T. R. 113. And he did not recognize the unlawful act of his deputy, but rescinded the levy as soon as he had notice of it: *Saunderson v. Baker*, 3 Wils. 309; 3. The damages are excessive, which is sufficient ground for a new trial in cases of tort: *Jones v. Sparrows*, 5 T. R. 257; *Ducker v. Wood*, 1 Id. 277.

Ingersoll, for the plaintiff, contended that Suter was a trespasser; he levied for the debt and costs, and, though he used no violence in entering the house, his conduct afterward made him a trespasser *ab initio*; 2. No warrant is necessary here, where bailiffs are not known; a bailiff in England is a servant for a particular purpose: *Drake v. Sykes*; an under-sheriff is a general servant, for whose acts the sheriff is liable: *Saunderson v. Baker*, 2 W. Bl. 832; *Ackworth v. Kempe*, Doug. 40. The sheriff's return, *ipso facto*, acknowledges the under-officer and his proceedings: 3 Wils. 311, 315; 3. There is no doubt but that a sheriff should answer for his deputy in compensatory damages, and no reason why he should not be liable for the insolence of an irresponsible deputy in exemplary damages.

Ross was proceeding to urge the distinction between a bailiff and under-sheriff, when *TILGHMAN*, C. J., said: "The case of *Drake v. Sykes* shows that in England the sheriff is liable for his known deputy, but not for his bailiff without warrant. Now we have no such an officer as a bailiff in this state. Suter was the defendant's known deputy."

By Court, *TILGHMAN*, C. J. The counsel for the defendant in support of their motion have contended that there was no trespass, because the costs were only secured and not paid; and because even if they were paid, the officer had a right to enter the house to look for goods of Clarkson, and after he was in he committed no violence, nor took anything away. As to the costs, the evidence warrants the plaintiff in saying that they were

paid. When the defendant had agreed to look to Mr. Reed for them, he had no right to levy; and so the defendant seems to think in his return to the *fi. fa.*; for he there assigns as an excuse for the levy that the deputy was not informed for the security which had been given. Then as to the entry being lawful to search for goods of Clarkson, granting that to be the case (concerning which, however, no opinion is given), the subsequent conduct of the officer in levying for costs when none were due, makes him a trespasser.

It was also contended that the sheriff was not answerable in an action of trespass for the conduct of his deputy. We are clearly of opinion that for all civil purposes he is answerable, though not criminally. There appears to be some doubt on the point in the case of *Saunderson v. Baker et al.*, reported in 3 Wils. 309; but the doubt is probably owing more to the inaccuracy of the reports than to any other cause. The same case is better reported in 2 W. Bl. 832. In *Ackworth v. Kempe*, Doug. 40, where the case of *Saunderson v. Baker et al.* was considered, Lord Mansfield looks upon the law to be quite clear in the manner I have stated it. It is a principle not lately introduced, but founded upon ancient authorities. And most inconvenient it would be if the law were otherwise; for the sheriff's deputies are frequently men of small property, and sometimes of bad character; and the responsibility ought to rest on the principal who had the sole power of appointing and removing them.

The last reason offered for a new trial is that the damages are excessive. This is the only point on which there could be a doubt. A distinction has been taken between exemplary damages and those which are only a compensation for the injury sustained. This distinction is certainly worthy of great consideration by a jury, when a principal, who has been no way to blame, is sued for the conduct of his deputy. But in point of law, if the sheriff is answerable at all, he must be answerable for such damages as the jury, on the whole circumstances, think proper to give. In the present instance, they have given exemplary damages; for the actual injury was nothing. They have thought it a necessary check to rude and improper behavior of the sheriff and his officers. The public safety requires that implicit obedience should be paid to officers of justice in the execution of their duty. On the other hand, the happiness of society requires that these officers should be influenced by powerful motives to avoid all acts of rudeness and wanton injury. It

does appear that the quiet of the plaintiff's family was invaded at a very unusual hour of the night, without just cause; and it also appears that the officer gave unnecessary uneasiness in the course of transacting his business; and this, too, after he had been warned that he was doing wrong. I am well satisfied, from the character of the defendant, that he was not accessory to this improper behavior. From the view which I have been able to take of the evidence, imperfect to be sure, because I did not hear it delivered on the trial, the damages appear to me to be severe; but as the jury have thought proper to make the conduct of the defendant's deputy an object of public example, I cannot say that I think them so altogether wrong that a new trial should be granted.

New trial refused.

In *Kuhn v. North*, 10 Serg. & R. 399, the court granted a new trial because the jury gave excessive damages against a sheriff for trespass. The execution was placed in the hands of one Hester, North's deputy. The deputy went to the plaintiff's house, inquired from his son, and was informed where the plaintiff was. The son asked his business, and was told he had a letter for his father; the son told the deputy that he knew it was an execution, and desired him to call again when his father would be in. Soon after the officer came again, with an attendant for the purpose of taking care of any goods he might levy on. He informed the plaintiff's daughter of his errand. She told him her father had made a bill of sale to her of the furniture. He desired her to produce it, and he would not levy. She was unable to find it; so the officer said he must leave the attendant in the house; but she remonstrated, and pledged her word to safely keep the goods, when the officer departed. It appeared that at the time the attempted levy was made the execution was invalid, the judgment having been indorsed as paid. On these facts, an action was begun against the sheriff, and damages awarded which were claimed to be excessive. The court, Duncan, J., distinguished the case from *Hazard v. Israel*, saying: "So that this case is distinguishable in every feature from *Sommer v. Wilt*, 4 S. & R. 19, and from *Hazard v. Israel*, where the entry was in the night-time, and the officer rude, insolent, and his whole conduct perverse and obstinate. That was a case for exemplary damages, but to give exemplary damages where the conduct of the officer is an example of moderation and mildness, would be an ill-judged example of making no distinction between oppression and humanity."

COMMONWEALTH v. MESSINGER.

[1 BERRY, 273.]

SECONDARY EVIDENCE OF CONTENTS OF STOLEN INSTRUMENT.—Upon the trial of an indictment for stealing a bank-note, bill obligatory, etc., evidence of the contents of the instrument may be given, without showing a notice to the defendant to produce the original.

PENAL STATUTE USING PLURAL TERM CONSTRUED.—Under a statute which declares that the larceny of bills obligatory shall be punished in the same manner as the larceny of any goods or chattels; the felonious taking, etc., of one such bill is punishable as a larceny.

INDICTMENT for feloniously stealing “one bill obligatory,” given by Messinger to Cleaver, and by him assigned to Henry Abel. The defendants were originally tried at the quarter sessions and found guilty, but the indictment was afterward removed to the circuit court, and a new trial had before BRACKENRIDGE, J., April, 1806.

The prosecution offered Abel as a witness, to prove the contents of the bill obligatory. To the admission of this testimony, counsel for the defendant objected that parol evidence could not be received to prove the contents of the bill, but that the bill should be produced, or evidence given of its loss or destruction; or if in the hands of defendants, as alleged, that notice should be given to them to produce it. The objection was overruled. Defendants were afterward convicted, whereupon their counsel moved for a new trial upon grounds which appear from the opinions rendered.

McKean, attorney-general, for the prosecution.

Hopkinson, for the defendants.

TILGHMAN, C. J. This is an indictment against the defendants for felony, in stealing a bill obligatory for one hundred and seventy-five pounds, from Philip Messinger to Jesse Cleaver, assigned by Cleaver to Henry Abel. On the trial of the cause, two points were reserved for the consideration of this court.

1. Whether parol evidence was admissible to prove the contents of the bill obligatory, described in the indictment, without having given notice to the defendants, or one of them, in whose hands it was, to produce it at the trial;

2. Whether the taking of one bill obligatory is punishable as a larceny, under the act of fifth of April, 1790, section 5.

As to the first point, the law seems to be settled in England that with respect to proving the contents of writings by parol evidence, there is no difference between civil and criminal cases. You are to produce the best evidence that the nature of the case admits of. The paper itself, if in existence, and in the power of the prosecutor, is to be produced; but if it is in the hands of the defendant, notice must be served on him, or his attorney, to produce it, because otherwise it cannot appear that the prosecutor might not have the original, if he had chosen to

call for it. The principle is established in the cases of *Le Merchant*, 1 McNally, 250; *The King v. Aickles*, 1 Leach, 330; *The King v. Watson*, 1 McNally, 234; and *Gates, qui tam v. Winter*, 2 T. R. 306.

So far as relates to all papers but that which is the subject of the larceny, I fully concur with the principle above mentioned; but with respect to the paper which has been stolen, a different rule has been followed in Pennsylvania. It has been usual to prove the contents of paper bills of credit before the American revolution, and of bank-notes since, without giving notice to the defendant to produce them. I am induced to follow this rule the more readily, because no injury can result from it to the defendant. He is informed by the indictment in what manner the paper in his possession is described, and if it is not truly described, he has it in his power to show it. This, in effect, is notice, and I think it is for the interest of the defendant to have it so considered. The court have no power to compel him to produce the papers; and the very circumstance of giving him actual notice to produce it, may, in case of his not complying, make an impression to his prejudice, in the minds of the jury. With regard to other papers, the case is very different. Not being the immediate subject of the prosecution, the defendant may be taken by surprise, having no reason to suppose that they will be brought into question. It is proper, therefore, in such cases, that no evidence but the paper itself shall be received, unless the defendant having received notice, declines producing it. I am, therefore, of opinion that in the case before us the parol evidence was properly admitted.

The second point turns on the fifth section of the act of fifth April, 1790. It is thereby enacted that "robbery or larceny of obligations or bonds, bills obligatory, bills of exchange, promissory notes for the payment of money, lottery tickets, paper bills of credit, certificates granted by or under the authority of this commonwealth, or of all or any of the United States of America, shall be punished in the same manner as robbery or larceny of any goods or chattels." The obvious intent of this law appears to be to put bonds, with respect to larceny, on the same footing as goods or chattels. They are made the subject of larceny, which they were not before. If larceny of bonds is to be punished in the same manner as the larceny of any goods or chattels, larceny of one bond may be so punished, because larceny may be committed of a single chattel. When it is said that larceny of bonds may be punished as larceny of any

goods or chattels, it is saying substantially that larceny of any bonds may be punished. Now if this had been the exact expression, it may be easily shown by authority, as well as reason, that larceny of one bond would have been included. The statute 82 Hen. VIII, c. 9, forbids the purchase of any pretended rights or titles. In the case of *Partridge v. Straunge and Croker*, which was an action of debt on this statute, 6 and 7 Edw. VI, Plowd. 86, Justice Hales gave his opinion, which was not contradicted by the rest of the court that the purchase of one pretended right was an offense against the statute, although the words are in the plural number. The statute 23 Hen. VIII, c. 1, takes away the benefit of clergy from persons who willfully burn any dwelling-houses or rob any churches or chapels. My Lord Hale takes it for granted, that the burning of one dwelling-house, or robbery of one church, is within the purview of this statute: 2 H. H. P. C. 365.

By statute 2 Geo. II, c. 25, s. 3, it is enacted that "if any person shall steal or take by robbery any bank-notes, bonds, bills, promissory notes for the payment of any money, etc., notwithstanding any of the said particulars is termed in law a chose in action, he shall be deemed guilty of felony of the same nature, and in the same degree, etc., and in the same manner as it would have been if the offender had stolen or taken by robbery any other goods of like value," etc. It was determined in *Hassel's case* that the stealing of a single bank-note is within the statute: 2 East Cr. Law, 598; S. C. 1 Leach, 1.

By act of assembly, twenty-second April, 1794, s. 5, any person who shall be convicted of printing, signing, or passing, any counterfeit notes of the bank of Pennsylvania, North America, or the United States, shall be punished as is therein prescribed. It has never been doubted that the printing of one counterfeit note is an offense within this act. Indeed the counsel for the defendants confess that if the expression in the act in question had been any bonds, etc., the construction must have included one bond, because they say the word any is put in opposition to none. But the word any may, with equal propriety, be applied to a substantive in the singular or in the plural number; and where it is joined to a substantive in the plural, it certainly has in strict construction a plural signification. So that all the cases I have mentioned where any churches has been construed one church, etc., prove that the strict meaning of the expressions has been departed from, in order to comply with the manifest spirit and intent of the law. The truth is, that this objection

is founded on a single case, which, when examined, does not warrant the extensive conclusion attempted to be drawn from it; I mean the case of the statute 1 Edw. VI, c. 12, by which the benefit of clergy is taken from the felonious stealing of horses, mares, or geldings. A doubt arose on this statute, whether clergy was taken from the offense of stealing one horse, and to remove the doubt the statute of 2 and 3 Edw. VI, c. 35, was made. My Lord Hale's account of the matter is this, that the doubt was not solely because the statute 1 Edw. VI, was in the plural number, horses, mares, or geldings, but because the statute 37 Hen. VIII, c. 8, was expressly penned in the singular number, "if any man do steal any horse, mare, foal, or filly;" and then this statute of 1 Edw. VI, thus varying the number, and yet expressly repealing all other exclusions of clergy introduced since the beginning of Henry VIII, made some doubt whether it was not intended to enlarge clergy where only one horse was stolen.

Upon a full consideration of the words of the act of assembly, and of all the authorities which bear upon the point, I am of the opinion that the felonious taking of the bill obligatory charged in the indictment is punishable as larceny.

YEATES, J. The first question to be considered is whether the admission of parol evidence on the trial of this indictment, respecting the bill obligatory alleged to have been stolen, was erroneous, no notice having been previously given to the defendants to produce it. The general rule is, Peake's Comp. 70, 71, that when an original instrument is in the hands of the party against whom it is intended to be given in evidence, no evidence whatever of its contents can be received until notice has been given to produce it, in order to avoid misrepresentation; and it is said, McNal. Evid. 348, 350, that there is no distinction in this particular between civil and criminal cases. Lord Mansfield seems, however, to have drawn a line of distinction between them in *Roe v. Harvey*, 4 Burr, 2489; and he lays it down that, in a criminal or penal case, the defendant is never forced to produce any evidence, though he should hold it in his hands in court. The rule is introduced to guard against a false statement of the facts contained in a written paper, and presupposes the possession of the paper clearly in the adverse party. But does it necessarily follow that the designation of a bill or note as the subject of larceny draws after it a minute description of its full contents, with the date and the names of the witnesses? And is it consistent with the benevolent spirit

of the law, that the stolen goods charged in the indictment for felony shall be deemed to be in the hands of the party standing upon his trial for the offense? The presumption of the law is directly adverse thereto. Innocence is always supposed until guilt is duly established. I take the larceny of paper bills of credit, made tenderable by particular laws, to be perfectly analogous to the present case; so of bank-notes. Numerous indeed have been the instances of indictments for felony in stealing such bills, laying the same in money numbered, both before and since the American revolution, and yet it was never thought necessary that notices should be given to the prisoners to produce upon their trials the bills which they were supposed to have stolen. The ground of guarding against misrepresentation would equally hold in all those instances; but it will not be asserted that the rule contended for has ever obtained an application in any of them. I conclude, therefore, that the admission of the parol evidence in the present case was strictly regular.

The next question is, whether the stealing of one bill obligatory is a felony punishable by the act of assembly passed April 5, 1790. I fully assent to the established principle that penal laws are to be construed strictly, and that they are to be carried beyond their letter. I also am disposed to concur with Dr. Burn, who asserts, when speaking of the statute 10 Geo. III, c. 18, the words whereof are, "if any person shall steal any dog or dogs of any kind or sort whatsoever, he shall forfeit for the first offense a sum not exceeding thirty pounds nor less than twenty pounds," that it might be doubtful whether, upon this act, it is penal to steal a bitch: 1 Burn's Just. 497. Whether the opinions of the judges on the stat. 1 Edw. VI, c. 12, which declared, "that no person or persons convicted of stealing horses, mares or geldings should be admitted to the benefit of clergy," (who conceived that it was not sufficient to exclude from clergy any person who should steal one horse, mare or gelding), was grounded on the words of the statute being merely in the plural number, according to Sir William Blackstone: 1 Bl. Com. 87; or that they entertained doubts thereon for the reasons assigned by Lord Hale, 2 H. H. P. C. 365, it is immaterial to determine. Dr. Burn assigns what he calls a plain reason for it: "What a man has a right to (as his life, liberty or estate) by a clear and undoubted law, shall not be taken from him by a law less clear and certain." It is sufficient to state that our books teem with authorities showing that penal statutes shall

not be construed beyond the strict letter. It must be remembered, says Lord Hale, 2 H. H. P. C. 344, that the party indicted must be brought within the very letter of the statute. But according to Lord Mansfield, 2 East's Cr. Law, 592, there is a great difference between bringing a case within the equity of an act where it is not within the words, and taking a case out of the meaning of an act by an equitable construction where it is within the words. The first ought never to be done in a criminal case; neither ought the second, if the case be in equal mischief with others clearly within the meaning of the act. The plain words, therefore, of the fifth section of the act of fifth April, 1790, must govern our decision on this question. The intention of the law-makers must be extracted from their own expressions. The whole must be read together. To every expression must be assigned its true meaning. We have no power to insert and interpolate on the one hand, nor, on the other, to drop and reject a single word, in order to make the act comport with our private sentiments. A rational construction must be formed on the *tout ensemble*, according to the apparent intention of the legislature as expressed by themselves.

So far as the section applies to the case under consideration, it will read thus: "Larceny of bills obligatory shall be punished in the same manner as larceny of any goods or chattels." Of the proper signification of the term "any" there is no dispute. Its natural sense seems to be settled by judicial decisions which we are not at liberty to dissent from unless they flatly contradict our ideas of right and wrong: *Hassel's case*, 1 Leach, C. L. 1; S. C. 2 East's C. L. 598. It is admitted that any is the converse of none. But it has been strenuously waged by the defendant's counsel, that the word any in the close of the section only relates to the punishment, and that it cannot amplify the preceding descriptive plural words. These cannot, in my idea, with propriety be termed descriptions of the offenses; they contain an enumeration of certain choses in action, which are considered as mere evidences of debts or duties, having no intrinsic value in themselves, and which the law-givers have made the general subject of robbery or larceny. It may well be asked, if we should not be guilty of a palpable violation of the terms of the law, by adhering to the construction that the stealing of one bill obligatory to any amount whatever is no larceny, and that the stealing of two or more bills of an inferior amount is larceny?

The mischief intended to be guarded against is precisely the same in both instances. Besides, are all the words of the law

satisfied by such narrowed construction? "Larceny of bills obligatory shall be punished in the same manner as the larceny of any goods or chattels." The stealing of one single, specific article is larceny, and punishable as such; and by making the larceny of bills obligatory punishable as thefts of any other personal property, the legislature have both in terms and substance enacted that the stealing of one single specific bill is also larceny. This appears to me to be the true meaning of the fifth section of the act collected *ex visceribus*. I cannot think the present case a *casus omissus*; and upon the whole, I am strained to say that the defendant might legally be convicted of stealing the bill obligatory laid in the indictment.

BRACKENRIDGE, J., delivered a concurring opinion.

SMITH, J., concurred.

New trial refused, and judgment for the commonwealth.

Bishop and Wharton, in their works on Criminal Law, notice this case: Bishop, 1 Crim. Proced. sec 753, citing this among other cases, says: "Where in these cases the thing stolen is in the possession of the officers, and is in court, it may be exhibited to the jury, and the witness may have it before him, and in his hands when he gives in his testimony. But there is no legal necessity for it to be in court. And if it is a written instrument, evidence of its contents may be introduced without accounting for its non-production, or giving notice to the defendant to produce it." So Wharton, 1 Cr. Law, sec. 608, citing the case says: "On a trial of an indictment for stealing a bank-bill, where the bill is in the defendant's possession, it is not necessary to account for the non-production; the fact of the indictment being found being sufficient notice to the defendant to produce it."

DESESBATS v. BERQUIER.

[1 BUNNEY, 336.]

LAW GOVERNING WILL AS TO PERSONAL PROPERTY.—A will of personal property not executed in conformity to the law of the testator's domicile at the time of his death, will not be operative in regard to personal property in a foreign country, although executed according to the laws of that country.

THIS action came before the court upon a *certiorari* from the common pleas of Philadelphia county, in which the following case was made.

"It is a feigned issue from the register's court to try the validity of a certain paper writing purporting to be the will of Jean Theil, deceased. It is admitted that the said instrument,

if it had been made by a citizen of Pennsylvania, would be a will, and that if the testator had been a citizen of the said state the property bequeathed therein would have passed thereby. On the other side it is admitted that the said Jean Theil was an inhabitant of Jeremie, in the island of St. Domingo, and a subject of France, at the time of making the said instrument; that he continued to reside there till the time of his death, and that by the laws of the said island the said instrument is not, nor was at the time it was made nor since, a last will and testament; and that the said Jean Theil, unless this instrument is established as a will, died intestate. That the property intended to pass by the said instrument, which is all personal property, was at the time of making thereof, and hitherto has remained and still remains in the hands of persons resident in and citizens of Pennsylvania. That Mr. Desesbats, the plaintiff, was, at the time of making the said instrument, an inhabitant of St. Domingo; but at the time of the death of the said Jean Theil, was an inhabitant of the island of Jamaica. If the court shall be of opinion that the instrument aforesaid under the above circumstances is to be considered in Pennsylvania as the will of the said Jean Theil, then the probate thereof taken by consent in the register's office in and for the city and county of Philadelphia to stand valid, it being admitted to be in due form according to the laws of Pennsylvania; otherwise judgment to be rendered for the defendant, and the said probate to be null and void."

Tod and Hare, for the plaintiff.

Duponceau, for the defendant.

TILGHMAN, C. J. This case was very well argued. Everything that ingenuity and industry could produce was brought before the court. If the case had been entirely new it would have been extremely difficult to decide. But although no authority directly in point has been produced, yet some principles have been established, by adjudged cases, which bear strongly on the question before us. It seems to have been formerly taken for law in Scotland that the goods found there of a person who died intestate in England should be distributed according to the Scotch law. But since the cases of *Bruce v. Bruce*, 2 B. & P. 231; *Ommaney v. Bingham*, and *Somerville v. Lord Somerville*, 5 Ves. Jr. 750, it must be considered as settled that "the succession to the personal estate of an intestate is to be regulated according to the law of the country of which he

was a domiciliated inhabitant at the time of his death." If this is the rule in case of intestacy, why should not the same rule prevail with respect to last wills? It is only with the view to promote the general convenience and happiness of mankind that any country allows the laws of a foreign nation to operate in any instance on property within its territory. It is supposed that every man is best acquainted with the law of his own country, and that when he dies intestate, it is his desire and expectation that his personal property, wherever situated, should be distributed according to that law; and to gratify this reasonable desire, it is the practice of civilized nations to extend their courtesy toward each other so far as to permit the law of the domicile of the intestate to prevail. This the counsel for the plaintiff candidly admit. But they contend that the establishment of the will of Jean Theil will answer the purpose, which should always be kept in view, that is to say, it will carry the wishes of the foreigner into effect. It is very true that in this instance it will; but we must take care how we establish a principle, which, at the same time that it carries the will of one man into effect, may tend to destroy the will of one hundred others. If we say that the will shall stand good because it is agreeable to our law, although contrary to the law of the testator's domicile, then we establish the principle that with regard to last wills the law of Pennsylvania, and not the law of the domicile, shall prevail. It will follow that the wills of foreigners, made according to the law of their own country, are to have no effect on movable property found here, unless they are agreeable to our law. This may produce very mischievous consequences, not only to foreigners who have property here, but to our own citizens who may have property abroad. For we must expect that other nations will pay no greater regard to us than we pay to them. We are a commercial people, and should be forward in reciprocating those acts of courtesy which the nations of Europe are in the habit of practicing. Indeed, we have always been sensible of the importance of paying a high regard to the law of nations. It is considered as incorporated with and forming a part of our common law: *Respublica v. De Longchamp*, 1 Dall. 114. Where a debt due from an Englishman to another has been discharged by a commission of bankruptcy in England, we recognize such discharge here. England pays the same regard to the bankrupt laws of other nations, as appears by the case of *Potter, etc. v. Brown*, 5 East, 124, where Lord C. J. Ellenborough, in delivering his opinion, says: "It

is every day's experience to recognize the laws of foreign nations as binding on personal property; as on the sale of ships condemned as prize by the sentence of foreign courts, and the succession to personal property, by will or intestacy, of the subjects of foreign countries." Let us now examine what is the conduct of France (for Thiel was a subject of France) in cases of this kind. France recognizes the bankrupt laws of other countries. We find the duchess of Kingston's will, made in France according to the law of England, was held good, for the disposition of her movable property in France: *Collect. Jurid.* 242; October 26, 1786. And the case from 4 *Denizart Testament*, 515, asserts the principle that the will must be according to the law of the domicile. No cases were cited to show that any respectable nation held different sentiments; and I think it may be concluded, from a full view of the subject, that to regulate the disposition of the movable property of deceased persons according to the law of their domicile, whether they die testate or intestate, is best calculated to promote the general convenience of the world, and most agreeable to those principles which have been established by judicial decisions among the most enlightened nations. I am therefore of opinion that the paper set up for the will of Jean Thiel is not a valid will, and that judgment be entered for the defendant.

YEATES, J. It has been remarked by Lord Chancellor Loughborough, 3 *Ves. Jr.* 200, that if the question whether the domicile of the party deceased should decide upon the succession to his personal property, was quite new and open, the point appeared to him susceptible of a great deal of argument. Numerous decisions in the court of session in Scotland, with one single exception, asserted the negative of that proposition. The different authorities on this head are collected in a note subjoined to *Bruce v. Bruce*, reported in 2 *B. & P.* 129. But the point is now settled by cases determined in the British house of peers: 3 *Ves. Jr.* 200; 2 *B. & P.* 229; 1 *H. Bl.* 690; 5 *Ves. Jr.* 786; 4 *T. R.* 184.

The master of the rolls, Sir Richard Pepper Arden, 5 *Ves. Jr.* 786, in 1801, has deduced the three following rules, as the results of the different authorities on the subject: 1. That the succession to the personal estate of an intestate is to be regulated by the law of the country in which he was a domiciled inhabitant at the time of his death, without any regard whatever to the place either of the birth, or the death, or the situation of the property at that time; 2. That though a man may have two

domiciles for some purposes, he can have only one for the purposes of succession; and 3. That the *forum originis* is to prevail until the party has not only acquired another, but has manifested and carried into execution an intention of abandoning his former domicile, and taking another as his sole domicile. The domicile by the civil law is there described, "*ubi quis larem rerumque ac fortunarum suarum summam constituit.*" But Sir Richard censured this definition as too vague and difficult of application, and thought Bynkershoek was very wise in not hazarding a definition of the term.

The counsel for the plaintiff in this case, in the course of their arguments, have not denied the authority of these rules; but they have contended that they apply only to cases of persons dying intestate, where, according to 2 Erskine, 697, the law of the domicile is considered as the presumed will of the party, and declaratory of his intention; and that the same ought not and cannot possibly control the solemn intention of the party declared by his last will to take effect after his death. I have no hesitation in asserting that the ingenious observations of those gentlemen struck me forcibly at the time, and my ideas of the justice and equity of the plaintiff's claim powerfully increased the effect of those first impressions.

But on a fuller research of the books and more mature deliberation, I felt myself constrained to abandon my private opinion of the supposed honesty of the plaintiff's demand. This part of the *lex gentium* is founded on the mutual courtesy of independent governments, looking forward to the common advantages and good harmony of civilized nations. The principle equally applies, whether the individual makes a will or not in a foreign country. The goods of individuals in their totality ought to be considered as the goods of the nation in regard to other states. They, in some sort, really belong to it, from the right it has over the goods of its citizens, because they make a part of the sum total of its riches, and augment its power; and because a nation has an interest in the protection it owes to its members. The foreign jurists, Vattel, Huberus, Wolfe, Denizart, Target, and Lord Kames, severally assert that the law of the domicile shall govern as to the regulation of the movable property of a subject or citizen dying in a foreign country, and that the validity of his testament as to its form can only be decided by the judge of the domicile, whose sentence delivered in form ought to be everywhere acknowledged: Vattel, 154, s. 85; 2 Huberus, lib. 1, tit. 3; 2 Wolfe, 201; 4 Denizart,

tit. Testament, 515; Target's Collect. Jurid. 242 (324); Kames's Princ. Eq. 356, lib. 3, c. 8, sec. 8. It has been said that Sir James Marriott has spoken lightly of the praelections of Huber; but it is well known that Lord Mansfield has cited his work with approbation; and Mr. Hargrave, Co. Litt. 80 b, has declared that his writings on the civil law are much esteemed. According to Lord Chancellor Thurlow, in *Bruce v. Bruce*, 2 B. & P. 229 (n), decided in the British house of lords in April, 1790, personal property follows the person of the owner; and in case of his decease, must go according to the law of the country where he had his domicile; for the actual *situs* of the goods has no influence. Lord Chief Justice Kenyon, in 1791, has said, 4 T. R. 192, generally speaking it must be admitted that personal property must be governed by the laws of that country where the owner is domiciled. Lord Chancellor Loughborough, in 1796, has declared: 3 Ves. Jr. 200, that it is now fixed law that the law of the country where the domicile is decides wherever the personal property is situated. According to Sir Richard Pepper Arden, in 1801, 5 Ves. Jr. 788, there is not a single *dictum* from which can be supposed that the place of the death shall make any difference. It is evident, therefore, that by the law of nations, as well as by the British decisions, the general rule, at least, is clearly established to be in favor of the defendant, and it was incumbent on the plaintiff to show that the making of a will under the circumstances of this case formed an exception. This had not been done; and it cannot be said with propriety that when the word succession is made use of, without a particular reference to an intestacy, that it necessarily excludes the taking under a will. But we have more; we have an authority in point. In *Sill v. Worswick*, 1. H. Bl. 690, determined in 1791, we find that Lord Chief Justice Loughborough expresses himself in these strong terms: "It is a clear proposition, not only of the law of England, but of every country in the world where law has the semblance of science, that personal property has no locality; with respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party, it follows the law of the person." Of the signification of the words, act of the party, there can be no doubt. The transmission of a man's property to others arises from civil institutions, and is the subject-matter of positive law. My former feelings on the justice and equity of the plaintiff's claim have been repressed by considerations of the imperious necessity of our strict adherence to uniform established rules. In *Bempde*

v. *Johnson*, already cited, Lord Loughborough declared the case of Sir Charles Douglas came before the house of lords under circumstances that affected the feelings of every one; for the consequences of the judgment which the house of lords found themselves obliged to give, were both harsh and cruel; and if the particular circumstances, raising very just sentiments in every mind, could prevail against the uniformity of the rule, it is so much the duty of courts of justice to establish, there could be no case in which the feelings would have [carried] one further.

On the whole matter I find myself constrained to deliver my opinion that judgment should be entered for the defendant.

SMITH and BRACKENRIDGE, JJ., concurred.

Judgment for defendant.

The English rule is that a will is inoperative in regard to personalty if it do not conform to the law of the testator's domicile at the time of his death, but the rule has lately been changed by Lord Kingsdown's act, 24 and 25 Vict. c. 114, sec. 2. Citing the principal case, *Redfield*, 1 Wills. 403, says: "The American courts early adopted the same rule, and so far as we have been able to ascertain by careful examination, have uniformly adhered to it. But a question of more difficulty has arisen in some cases, and where there seems to exist a serious conflict of authority, and especially among the continental jurists of Europe; that is, whether a will executed in conformity to the law of the place where made, and of the domicile of the testator at the time of its execution, is rendered inoperative by a change of domicile of the testator, by reason of not conforming to the law of the place of the domicile at the time of the decease of the testator. This question arose in a case in New York which passed through all the subordinate courts, and was finally determined by the courts of appeals, where it was held, three of the judges dissenting, that whether a deceased person died intestate or not is to be determined by the law of the place where he was domiciled at the time of his death." The case to which reference is here made is *Moultrie v. Hunt*, 23 N. Y. 394, and is a case of much importance on this subject. The testator, Benjamin F. Hunt, resided at Charleston, and there made his will in August, 1849, in conformity to the laws of South Carolina. After this he removed to New York, where he took up his domicile, and there died. His will was attested, at his request, by three witnesses; but Mr. Hunt did not state to the witnesses the nature of the instrument which he requested them to attest, and thus failed to comply with one of the requirements of the statute in New York, which requires a publication of the will to make it valid. The surrogate, when the case came before him, decided to admit the will to probate. This decree was affirmed by the supreme court, whence it was taken on appeal to the court of appeals, and the decision was there reversed, a very able judge, Denio, writing the opinion of the court. He holds that a will cannot operate so as to confer rights of property until the death of the testator, until which event it is in its essence ambulatory and revocable. Therefore, it is the law in force at the death of the testator that should govern as to the due

execution of a will, and the capacity of the testator. He illustrated this proposition by the instance of the legislature making laws that would operate to render invalid wills already executed, and then shows that where a will was witnessed by only two witnesses, three being required at the time it was made, that it was subsequently validated by a law in force at the time of the decease of the testator, which allowed an attestation by two witnesses. He then says, as a result of his examination: "The result of the cases, I think, is that the jurisdiction in which the instrument was signed and attested is of no consequence, but that its validity must be determined according to the domicile of the testator at the time of his death. Thus in *Grattan v. Appleton*, 3 Story, 755, the alleged testamentary papers were signed in Boston, where the assets were, and the testator died there, but he was domiciled in the British province of New Brunswick. The provincial statute required two attesting witnesses, but the alleged will was unattested. The court declared the papers invalid, Judge Story stating the rule to be firmly established that the law of the testator's domicile was to govern in relation to his personal property, though the will might have been executed in another state or country, where a different rule prevailed. The judge referred approvingly to *Desebats v. Berquier*, decided as long ago as 1808."

The doctrine of *Moultrie v. Hunt* has since been affirmed, and the case cited and approved in *White v. Howard*, 46 N. Y. 144, Grover, J., giving the opinion. He says: "The testator, William Bostwick, at the time of his death, in April, 1863, was a resident of the state of Connecticut, and had been for a number of years prior thereto. The validity of the bequests of his personal property, and all questions of succession thereto, or rights therein, must be determined under the laws of that state, and by the courts of that state where the property or those having possession or control thereof, are within its jurisdiction: *Parsons v. Lyman*, 20 N. Y. 103; *Moultrie v. Hunt*, 23 Id. 394; Story on Conf. of Laws, sec. 468." The principal case is cited in *Harvey v. Richards*, 1 Mason, 408, 421, by Story, J., and in *Perry Manf. Co. v. Brown*, 2 Wood & M. 464, by Woodbury, J. As sustaining the doctrine of the principal case, see *Irwin's Appeal*, 33 Conn. 128; *Nat v. Coons*, 10 Mo. 543.

EWING v. TEES.

[1 BENEY, 450.]

PAROL CONTRACT BY AGENT FOR SALE OF LANDS.—Where the statute of frauds enacted in a state omitted the English provision that no action should be brought to recover damages on any contract for the sale of land, unless the agreement shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized, it was held that a parol contract for the sale of land was valid, so as to support an action for damages, though made with an agent who had merely parol authority.

ACTION for damages for breach of contract. The trial came on before YEATES, J., at which the following facts appeared: On the fourteenth November, 1801, defendant entered into an

agreement in writing with J. S. Otto, as agent for the plaintiff, for the purchase of a tract of land from plaintiff for six thousand three hundred and sixty-six dollars and sixty-seven cents; three hundred dollars to be paid on the seventeenth of the same month, possession of the premises to be given to the defendant on the thirtieth, and the balance of the purchase money to be paid December 22, following, when the deed was to be executed. A witness testified that on the seventeenth, defendant went to Otto, and expressing some dissatisfaction at the sale, the latter said that it was uncertain whether his principal would affirm the agreement, whereupon defendant replied that that was the day for the payment of the three hundred dollars, and if it were not settled then whether or not he was to have the land, he would have nothing more to do with it. Otto answered, if you do not take the place now, you will be sorry for it hereafter. The witness could not say that Tees tendered the three hundred dollars, but believed he had it in his pocket.

Afterward, between the seventeenth and twenty-fifth, Ewing assented to the agreement, and tendered possession on the thirtieth, and a deed on the twenty-second December, both which the defendant refused. The premises were then sold for a less sum than that agreed to be paid by Tees, and for the breach of the contract this action was brought.

A point of law was reserved, whether, under the circumstances of the case, Otto's authority should not have been in writing; and the question of fact as to the tender of the three hundred dollars was submitted to the jury, who found for the plaintiff two hundred and eighty-three dollars and twenty-one cents damages.

Ewing and Sargent, for the plaintiff, contended that as the section of the English statute relative to parol agreements for sale of land had been omitted from the Pennsylvania statute, such agreement would support an action for damages, *a fortiori*, parol authority to an agent to agree: *Sugden*, 56; *Bell v. Andrews*, 4 Dall. 152; and that the most required by the statute of frauds was, that the instrument should be signed by the party to be charged or his agent: *Hatton v. Gray*, 2 Chan. Ca. 164; *Fowle v. Freeman*, 9 Ves. Jun. 351.

Meredith and S. Levy contended that the spirit of the Pennsylvania statute was not to have any agreement concerning lands rest upon parol evidence: *Nicholson's Lessee v. Mifflin*, 2 Dall. 246. It is essential for the party signing to have some evidence

in his hands of the acquiescence of the other party: 1 Pow. Cont. 286. Defendant retracted his promise before it was accepted by the plaintiff: 1 Pow. Cont. 544; *Payne v. Cave*, 2 Dall. 246. The contract was not mutual: *Cooke v. Oxley*, 3 T. R. 649. Counsel further argued that by virtue of the words "under the circumstances," in the question reserved, they could move for a new trial, which the court, in its discretion, might grant, though the four days prescribed by statute in which to make such a motion had expired.

TILGHMAN, C. J. This cause was tried before Judge Yeates, at *nisi prius*, in December, 1808, and on the trial a point was reserved on which it is now brought before the court. The action was brought to recover damages for breach of a written agreement, by which the defendant engaged to purchase a tract of land, the property of plaintiff. The agreement was signed by the defendant, and by Jacob S. Otto, who was alleged by the plaintiff to be his agent. It was objected by defendant that supposing Otto to be the agent, it was necessary that his authority from the plaintiff should have been in writing. The point reserved by the judge was "whether, under the circumstances of the case, J. S. Otto should not have been authorized in writing to make the contract on which the suit was brought to recover damages." The facts in the cause were to be decided by the jury, taking it for granted that the authority need not be in writing.

The act of assembly "for the prevention of frauds and perjuries," on which this point arises provides, that "all leases, estates, interests of freehold, or term of years, or any uncertain interest of, in, or out of any messuages, manors, lands, tenements,, or hereditaments, made or created by livery and seisin only, or by parol, and not put in writing, and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing, shall have the force and effect of leases or estates at will only, and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, except leases not exceeding the term of three years from the making thereof."

It is evident that this provision extends only to the estate intended to be passed. No estate in lands shall be conveyed by one person to another unless the agent is authorized by writing. But it is one thing to convey an estate, and another and very different thing to make an agreement that you will convey it. It might be good policy to establish certain solemnities, without

which the title of land could not be transferred, because the peace and happiness of society are promoted by the clearness and facility with which the titles of real estate may be ascertained, and by preventing those frauds and perjuries which would inevitably take place, if, after a great length of time, it was permitted to establish a title by parol evidence only. Whereas, an action for damages for not performing a contract is of much less moment. The jury may give such damages as under the circumstances of each case may appear reasonable, and these damages will often be very small, and there is less danger of perjury, because those actions are limited so that they must be commenced in six years. I should think the case sufficiently clear if it was taken upon the act of assembly, without any other consideration; but it is still clearer when we turn to the English statute of frauds and perjuries: 29 Car. II, c. 3. It is plain that our legislature had that statute before them when they framed the act in question; because that part of our law which I have recited is copied very nearly verbatim from the English law. But there is a total omission of the fourth section of the English statute, which enacts that no action shall be brought to recover damages upon any "contract or sale of lands, tenements, or hereditaments, or any interest in or concerning the same, unless the agreement on which it is brought, or some memorandum or note thereof, shall be in writing, signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." It is impossible that this omission should have been accidental. It must have been intended to leave the common law unaltered as to the redress which affords for breach of a parol contract by recovery of damages. Agreeable to this construction is the sentiment expressed by this court in the case of *Bell v. Andrews*, 4 Dall. 152, although the point now in contest is different from that which was then before them. The same construction has been given in several cases at *nisi prius*, in which damages have been recovered on parol contracts for sale of lands.

But the defendant's counsel have contended that if the opinion of the court on the reserved point is against them, they ought to have a new trial; because they proved to the jury that Otto had no authority to make the sale at the time the writing was signed, nor at the time when the first payment was to have been made by the defendant. In the first place it must be remarked, that no motion for a new trial was made, and the four days for making it are out, so that no motion can now be received. It

has been urged, that still, if the court perceive by the judge's report of this case, that manifest injustice has been done to the defendant, they will take the matter up themselves, and order a new trial. All that I shall say at present is, that it must be an exceedingly clear error indeed that should induce me to interfere, after the four days have expired without a motion for a new trial. Nor will I commit myself by saying whether or not I should think myself justified in doing so, in any case of a civil nature. It is enough, that in the present case I am by no means satisfied that any injustice has been done to the defendant. There is no proof that, as his counsel contend, he tendered the money due for the first payment, and that Otto refused to receive it because the plaintiff had not ratified the contract; nor even that he had the money ready to tender. The testimony of the witness, on whom he relies to prove that Otto said he had no authority to make the sale, is not free from considerable inconsistency. It was established beyond doubt, that as soon as the plaintiff was informed of the contract, which was not more than ten days from its making, he gave his assent to; that possession was offered to the defendant on the thirtieth of November, the day appointed for that purpose; and that at the time fixed for making the last payment, the plaintiff tendered the defendant a deed of conveyance in fee-simple. Thus every act of the plaintiff tended to a faithful performance of his part of the agreement; while the defendant's whole conduct evinced an intention to fly off. And, what has great weight with me, Judge Yeates, before whom the cause was tried, and who had a better view of the evidence than we now have, is well satisfied that injustice has not been done by the verdict. My opinion, therefore, is that a new trial should not be granted.

YEATES and BRACKENRIDGE, JJ., concurred.

SMITH, J., concurred as to the validity of the contract, but, from the circumstances, he thought a new trial ought to be granted.

HUGHES v. HEISER.

[1 BINGHAM, 463.]

CONSEQUENTIAL DAMAGE OCCASIONED BY NUISANCE.—To support an action on the case for damage sustained by a common nuisance it is not necessary that the damage should have been direct, it is sufficient if it was consequential.

SPECIAL DAMAGE SUFFICIENTLY AVERRED.—The plaintiff declared that he had prepared rafts with intent to navigate them down a river which

was constituted a public highway, and that he did navigate them until he came to a dam erected by the defendant, by which he was prevented from passing down the river with his rafts. It was held that this was a sufficient averment of special damage to support an action.

Writ of error from the common pleas of Berks county. Heiser, the plaintiff below, brought an action against Hughes for obstructing the navigation of the Big Schuylkill. Plaintiff declared that the Big Schuylkill had been made a public highway within certain limits for the passage of boats and rafts by an act of assembly, which reserved to persons owning lands upon the river the power still to erect dams, provided such dams were constructed so as not to obstruct navigation; that defendant built a dam across the river within the prescribed limits and without proper slope or locks, thereby obstructing navigation; that plaintiff, after the passage of the act of assembly, made three large rafts and floated the same down the Big Schuylkill to defendant's dam; that by reason of this dam, plaintiff was prevented from passing further down the river with his rafts to his damage in two hundred dollars. The jury found a verdict for the plaintiff and assessed the damages at forty pounds.

Evans and Ingersoll contended, on behalf of the plaintiff in error, that the dam was a common nuisance: Co. Litt. 56a; 3 Bl. Com. 219; and the action in this case could not be maintained as particular and direct damages had not been alleged: *Paine v. Partrich*, Carth. 194; *Hubert v. Groves*, 1 Esp. 148; Bull. N. P. 26. Moreover the damages should have been laid with a *per quod*, and special damages will not be presumed even after verdict unless it be a necessary implication from the facts stated in the declaration: *Spieres v. Parker*, 1 T. R. 141; *Bishop v. Hayward*, 4 T. R. 470; *Stennell v. Hogg*, 1 Saund. 228 c.

Dallas, for the defendant, insisted that special damages had been set forth in the declaration, that it was only material for the persons suing to have sustained damage not common to all others: *Williams's case*, 5 Rep. 73. The obstructing a road so as to necessitate taking a circuitous route, was held actionable in *Hart v. Bassett*, 4 Vin. 519, pl. 7; *Iveson v. Moore*, 12 Mod. 269. Damages are necessarily implied from the facts stated in the declaration.

By Court, TILGHMAN, C. J. This cause comes before the court on a writ of error to the common pleas of Berks county. It is an action on the case for damages occasioned to Heiser, the plaintiff below, who is defendant in error, by the defendant's

obstructing the navigation of the Big Schuylkill, which was made a public highway by act of assembly. The plaintiff in error contends that the declaration contains no cause of action, because it shows no special damage sustained by the plaintiff below.

The general principle has been always agreed, that for an obstruction to a highway which is a common nuisance, an action cannot be supported but by a person who has suffered some special damage. But in the application of this rule to the different cases which have arisen, there have been decisions which are not to be reconciled. In *Hart v. Basset*, 33 Car. II, Sir T. Jones, 156, an action was supported by a person entitled to receive tithes, who in consequence of an obstruction in the highway, was forced to carry his tithes by a circuitous route. The declaration alleged that he was forced to carry them by a longer and more difficult way, and no other damage was shown. In *Paine v. Partrich*, 3 Wm. and Mary, Carth. 105, the court are made to say, that if by a common nuisance a man is delayed in his journey, by reason whereof he is damnified, and some important affair neglected, an action does not lie, because to support an action the damage must be direct, and not consequential; as, for instance, the loss of his horse or some corporal hurt. Such seems to have been the opinion of Holt, C. J., in *Iveson v. Moore*, 10 Wm. III, Carth. 451, where the plaintiff alleged that he had a great quantity of coals (he being possessed of a colliery and a coal mine), which he was prevented from carrying in his carts and carriages by reason of an obstruction in the highway raised by the defendant. One of the other justices of the king's bench agreed with Holt, but the two others were against him. In consequence of this difference of opinion, the case was laid before all the judges on a consultation in the exchequer chamber, and they were of opinion the action lay. Willes' Rep. 74, note a. In *Chichester v. Lethbridge*, 11 Geo. II, Willes, 71, the plaintiff averred that at divers times between two certain days, he was traveling in his coach in a certain highway, but the defendant obstructed the said way by bars, post-trenches, etc., and in his proper person withstood the plaintiff from removing and abating the obstruction, so that the plaintiff then, and hitherto, could not, and cannot, have or use the said way as he ought, to his damages forty pounds. The court were of opinion that particular damages were assigned sufficient to support the action, and cited *Hart v. Basset* in support of their opinion. They said this case was stronger than

Hart v. Basset, in two particulars, one of which was "that it was expressly laid that the plaintiff was attempting to travel the road, but could not by reason of the obstructions." This case of *Chichester v. Lethbridge*, appears to be the last adjudged in England on the subject, prior to our revolution. Since the revolution, the case of *Hubert v. Groves*, shortly reported in 1 Esp. 148, has been adjudged in express contradiction to *Hart v. Basset*. This case of *Hubert v. Groves* is no authority here, and no further to be regarded than its intrinsic merit demands. There is no occasion, however, to decide to which of these cases the court inclines, because they think the case before them stronger than either. The plaintiff has averred that he had procured a large quantity of boards and timber, and made them into rafts to bring down the river; that he seized the opportunity of a flood, and did come down as far as the obstruction, and was there stopped by the obstruction. It is certain that he must have suffered special damage, and the jury have found so; and if he has, it is immaterial whether it was immediate or consequential.

The court are of opinion, therefore, that the judgment in the court below was rightly given for the plaintiff, and must be affirmed.

Judgment affirmed.

WATSON'S LESSEE v. BAILEY.

[1 BINKLEY, 470.]

DEFECTIVE ACKNOWLEDGMENT BY FEME COVERT.—Where a statute required that the wife should be examined separate and apart from her husband, and that the full contents of a deed or conveyance shall be read or otherwise made known to the wife, and the certificate of acknowledgment by the judge of the common pleas indorsed on a deed of the wife's land by husband and wife, stated that they "personally appeared before him, and acknowledged the indenture to be their act and deed, and desired the same to be recorded, she being of full age, and by him examined apart," it was held that this was not sufficient to pass the wife's estate.

PAROL TESTIMONY INADMISSIBLE TO SUPPORT CERTIFICATE.—Parol declarations of the wife are inadmissible, showing that she executed the deed voluntarily, and that if it were not sufficient, she would execute and acknowledge it again, or do any other act to make the deed good.

APPEAL from an order of the circuit court of Lancaster county refusing defendant's motion for a new trial in an action of ejectment brought by the lessee of Watson and wife. Mrs. Watson

claimed the premises as heir at law of Margaret Mercer, in whom the title was formerly vested. The defendants also derived title from Margaret Mercer by virtue of a deed of bargain and sale, executed by her and her husband to one Thompson, who, on the same day, reconveyed the premises to the husband, of whom the defendants were heirs. The deed to Thompson bore the following acknowledgment: "Lancaster county, ss. Personally appeared before me the subscriber, one of the justices of the court of common pleas for the county aforesaid, the within named James Mercer and Margaret, his wife, and acknowledged the above written indenture to be their act and deed, and desired that the same might be recorded. She, the said Margaret, being of full age, and by me examined apart. In testimony whereof, I have hereunto set my hand and seal, this thirtieth day of May, Anno Domini 1785." The chief justice before whom the cause was tried held that the acknowledgment was defective, and that the deed did not pass the wife's estate; and also overruled evidence offered by the defendant of parol declarations of the wife that she executed the deed voluntarily, and that if it was not good she would acknowledge it over again.

The jury found for the plaintiff, and from the order denying defendant's motion for a new trial an appeal was taken to this court.

The sufficiency of the acknowledgment turned upon the construction of an act of assembly of twenty-fourth February, 1770, entitled "an act for the better confirmation of the estates of persons holding or claiming under *femes covert*, and for establishing a mode by which husband and wife may hereafter convey their estates." The first section declares valid those conveyances made to *bona fide* purchasers for valuable consideration, under the usages theretofore existing. The second section then recites: "And in order to establish a mode by which husband and wife may hereafter convey the estate of the wife, be it enacted that where any husband and wife shall hereafter incline to dispose of and convey the estate of the wife, or her right of, in or into any lands," etc., it shall be lawful for them to make, seal, etc., any grant, bargain and sale, etc., of lands, and after such execution, appear before a judge of the supreme court, or justice of the common pleas, for the county in which the lands are situated, to acknowledge such conveyance, and said judge or justice is authorized and required to take the acknowledgment; "in doing whereof, he shall examine the wife separate

and apart from her husband, and shall read, or otherwise make known, the full contents of such deed or conveyance to the said wife; and if upon such separate examination she shall declare that she did voluntarily and of her own free will and accord, seal, and as her act and deed deliver the said deed or conveyance, without any coercion or compulsion of her said husband," such deed or conveyance is declared to be good and valid in law to all intents and purposes, as if the wife had been sole, "any law, usage, and custom to the contrary in anywise notwithstanding:" 1 St. Laws, 536.

Montgomery and Tilghman, for the appellants, maintained that the act of 1770 made no distinction between deeds to pass the wife's contingent right of dower, and deeds to pass her separate estate; and the present form of certificate is almost universally indorsed on deeds to bar her dower. There has existed a usage in this respect, validated by the act of 1770, for *femes covert* to pass their estate by a simple bargain and sale before sale, and the wife to make an acknowledgment separate and apart from her husband without more. But admitting a new mode is pointed out by the act, what does the act direct? That the justice shall do certain things, but not that he shall recite all he does. The only thing wanting is, that he made known to her the contents, and this is to be presumed. It is a principle, that where the law intrusts a judicial officer with power to do a certain particular, everything forming that particular is presumed to have been done. Here he has certified the separate examination, which includes the making known the contents and her declaration that she acts without coercion. Credit should be given to justices of the peace that they have done right in the execution of their power: *The Queen v. Simpson*, 10 Mod, 382.

Hopkins, for the appellee. Whatever in common cases may be the presumption in favor of justices, none is ever made as to the deed of a married woman; for the general presumption being that such a deed is void, it is essential that those things which constitute its validity should manifestly appear on it. The defendants' title is defective, even upon the ground of usage, as they are not *bona fide* purchasers for a valuable consideration; the deed of the husband and wife was only to secure the fee in the husband. The contest is between an *hæres factus* and an *hæres natus*; an equity will never aid a defective conveyance to transfer an estate from the latter to the former. From

the preamble it is manifest that deeds to bar dower are not included. If the contents are presumed to have been known, and the requisite declarations to have come from the wife, it is idle to make a record of any part of the proceeding. A mere certificate that the parties had been before the justice would be sufficient grounds for presumption. Another answer to the doctrine of presumption is, that where a magistrate sets out a proceeding manifestly defective, the law is not at liberty to presume that he has done right in the execution of his power; he may have had the law in his eye, but he has either misunderstood or disregarded it. No subsequent declaration of the wife can validate the certificate. What the wife says upon the subject must be said before the proper officer, apart from the husband, and be so certified.

YEATES, J. This is an appeal from the decision of the circuit court of Lancaster county, overruling a motion for a new trial. The facts of the case are shortly these: Sarah, one of the lessors of the plaintiff, claimed as the sister and heir at law of Margaret Mercer, who died without having had issue by her husband, James Mercer. Mrs. Mercer was seised of the lands in her own right. On the thirtieth May, 1785, James Mercer and Margaret, his wife, executed a conveyance of the premises to Nathan Thompson in fee-simple, in consideration of eight hundred pounds, and on the same day, as is indorsed on the deed, they appeared before Henry Slaymaker, one of the justices of the court of common pleas for Lancaster county, and "acknowledged the within written indenture to be their act and deed, and desired that as such the same might be recorded; she, the said Margaret, being of full age and by the said justice examined apart." This the justice certified under his hand and seal. If the conveyance divested the said Margaret Mercer of her legal title to the lands, the plaintiff was not entitled to recover them, and the defendants would be entitled to a new trial. The validity of the conveyance, it is agreed, depends upon the true construction of the act of assembly, passed on the twenty-fourth February, 1770, entitled "an act for the better confirmation of the estates of persons holding or claiming under *femes covert*, and for establishing a mode by which husband and wife may hereafter convey their estates:" 1 St. Laws, 535. The preamble of the act recites that "it had been theretofore the custom and usage ever since the settlement of this province in transferring the estates of *femes covert*, in many cases, for the husband and wife to execute the deed or conveyance in the

presence of witnesses only; and in other cases, after such execution, to acknowledge the same, the said wife being separate and apart from her husband examined; by means whereof a very great number of *bona fide* purchasers for a valuable consideration had become the just and equitable owners and possessors of such estates." It then goes on to provide that such grants, deeds, etc., theretofore *bona fide*, made and executed by husband and wife in manner aforesaid, shall be good and valid in law.

There can be no doubt that the decisions in this court, in the *Lessee of Davy and Wife v. Turner*, in September term, 1764, where there was an acknowledgment by *baron* and *feme*, and which was carried by appeal to the king in council (1 Dall. 11), and in *Lloyd's Lessee v. Taylor*, in April, 1768, where there was no acknowledgment (1 Dall. 17), gave birth to this law. These decisions were founded on a principle highly conducive to the peace of society, that *communis error facit jus*. The law in the first section having put such *bona fide* purchasers in a state of perfect security, proceeds to establish a rule for future cases. It declares that "where any husband and wife shall thereafter incline to dispose of and convey the estate of the wife, or her right of, in or to any lands, tenements or hereditaments whatsoever," it shall and may be lawful for the husband and wife to execute any grant, etc., and to acknowledge the same in the mode pointed out by the act, which is thereby declared to be good and valid in law to all intents and purposes, as if the said wife had been sole and not covert.

It has been contended that the acknowledgment herein directed extends to such deeds wherein the wife joins the husband to bar her of dower, equally with those which she before held in her own right; and that a practice founded on the former loose mode of taking acknowledgments has been continued, which it would be highly mischievous and inconvenient now to impeach, and that common usage has expounded the act.

If the first remark rested on solid grounds, I should long pause before I adopted a construction which eventually might unsettle many estates. The maxim of "*communis error facit jus*" has great weight with me, where the most injurious consequences would flow from counteracting it. I admit that the words standing by themselves might, from their generality, be supposed to comprehend cases wherein the wife releases her contingent interest of dower; but the whole section must be read together in order to collect the true meaning of the legislature.

They distinctly express their intention and the object of their provision in the beginning of the sentence thus: "And, in order to establish a mode by which husband and wife may hereafter convey the estate of the wife, be it enacted," etc. The words, therefore, "such deeds," which are twice mentioned in the subsequent part of the section, evidently refer to deeds whereby the estate of the wife is conveyed, and no other. This law had two distinct objects in view; the quieting and securing the titles of purchasers of the lands of married women, under the ancient usage, and prescribing a new method of conveying them, instead of the tedious and expensive ceremony of fines at common law; and both the title and preamble of the act strongly negative the construction set up by the defendant's counsel. I cannot, therefore, bring myself to believe that the law under consideration had any effect on the acknowledgments pointed out by the act of 1715: 1 St. Laws, 109. "No doubts had arisen whether deeds so acknowledged were not sufficiently valid in law to transfer and pass the possible interest of the wife," in case she survived her husband, to lands held by him during the intermarriage. The act of eighteenth March, 1775, 1 St. Laws, 703, entitled "a supplement to the act entitled an act for acknowledging and recording of deeds," also points out acknowledgments without prescribing their form. I presume it will not be contended that the words of the act of 1770, as to acknowledgments, are adopted by this latter act. Thinking then, as I do, that this law of twenty-fourth February, 1770, is susceptible of no other construction than that which I have mentioned, if I am correct therein, the mischievous consequences which it is apprehended may flow from the usual mode of taking acknowledgments cannot arise. It is by no means a very general practice for married women to transfer the lands which they hold in their own right; and the acknowledgments of such conveyances have in general been correct.

I do not take a literal strict adherence to the very words of the act to be essentially necessary in these cases; but the substantial requisites by which the rights of married women were intended to be guarded by the legislature should be pursued. Lord Hardwicke has somewhere said that the wife may be intimidated by cruelty on the part of the husband, as well as seduced by his flattery and extreme kindness, to do acts which on more mature deliberation she would totally disapprove of. In this acknowledgment her consent to the deed is not expressed by the justice which alone could give it validity without

adverting to smaller matters. We may regret that the unskillfulness or negligence of the scrivener had led to this error; but we are bound to say *ita lex scripta est*, and the party must abide by consequences of his own acts.

It has been contended that we should give credit to a certificate of a judge of the common pleas in the execution of his powers; and he having certified here that he had taken the acknowledgment, *omnia præsumuntur esse rite acta*; and that parol testimony was offered to the circuit court of the declarations of Mrs. Mercer, at other times, of her perfect freedom of will in executing the conveyance, and that she would join in any other act in confirmation of her deed. This, it is said, comes in aid of the legal presumption and removes every presumption to the contrary. To this I answer, she should have appeared before a proper tribunal and declared her consent, separate and apart from her husband, in the manner pointed out by the laws of the country. Such parol testimony ought not to be received. It leads to great uncertainty and mischief in tracing titles to real estates at a distant day. Our law is a system of policy. It is adapted to our local situation and the common safety. In England, the rights of a married woman to lands can only be passed by the medium of a fine. Her examination must ever appear on the writ; and if the judge doubts of her age he may examine her upon oath: 2 Inst. 515. These regulations guard the interests of the wife as far as human prudence can effect that object. The act of 1715 directs that the justice shall certify the acknowledgment or proof on the back of the deed under his hand and seal, together with the day and year when the same was made. The act of twenty-fourth of February, 1770, evidently points to the same mode of certificate; and an important trust is confided to the judge or justice before whom the acknowledgment is made. The justice of the court of common pleas has not conformed to the directions of the law "establishing a mode by which husband and wife may convey the estate of the wife," but has materially and substantially failed therein. The provision was introduced as a substitute for a fine, which if not pursued the deed was not validated by the act.

In the present instance the intention evidently was to divest the wife of her legal right in the lands and vest it in the husband; and if in any case a court of justice would insist on at least a substantial adherence to the manner of acknowledgment prescribed by the law, it would be in such a one as is now before

us. The conveyance from Mercer and wife to Thompson, and the reconveyance of Thompson to Mercer, bear equal dates and are acknowledged on the same day, before the same justice, and contain the same consideration money of eight hundred pounds.

I am therefore of opinion that this deed had no legal effect against the heir at law after the death of the wife; that the parol testimony was inadmissible in aid of the defective acknowledgment; and that the decision of the circuit court be affirmed.

SMITH, J., concurred.

BRACKENRIDGE, J., took no part in the cause, having, on the circuit, ruled differently from the chief justice.

Judgment affirmed.

See the note to *Smith v. Ward*, 1 Am. Dec. 82, where the case is cited among others showing that no parol evidence can be admitted to supply defects in a certificate of acknowledgment. The principal case is regarded as a leading case on this point.

DILWORTH v. SINDERLING.

[1 BERRY, 488.]

ALLOWANCE FOR IMPROVEMENTS IN EQUITY.—Equity will not relieve against a party in possession under a defective title, unless an allowance be made for improvements.

ALLOWANCES TO TRUSTEE.—A trustee is entitled to interest on advances made for the use of the *cestui que trust*. He is also entitled to an allowance for depreciated money paid him for rent of the trust estate; for expenses incurred in erecting necessary and proper buildings, although the *cestui que trust* was not consulted.

INTEREST, RULE AS TO.—It is now a settled rule that interest is recoverable for money lent and advanced.

ACTION of ejectment, in which judgment was entered for the plaintiff, by consent, subject to the payment of such an amount as should be found due defendant, Lewis, as executor and residuary legatee of Benjamin Fuller. At *nisi prius*, before YEATES, J., the jury found for Lewis, two thousand nine hundred and thirty-six dollars and forty cents. The case came before this court on a motion for a new trial by the plaintiff, when Judge Yeates reported the facts as follows: About the year 1770, the congregation of the protestant episcopal church made a subscription of about four hundred pounds and confided the money to Benjamin Fuller and two others, “to be by them laid out in the purchase of a small piece of ground, or in such other manner as to

them should seem best, for the support of Mr. Sturgeon, and the maintenance and education of his younger children." Mr. Sturgeon was the minister of said church, and previous to the subscription had been in great distress. The execution of the trust was left to Fuller, who purchased with the money the premises in question; and took the title in his own name, he having paid more for the land than the amount of the charity. Sturgeon died after living on the land a short time. Fuller then took charge of the three minor sons, who were the particular objects of the trust, and defrayed the expenses of their maintenance and education. When they left school, they were bound as apprentices, and to two of them on coming of age, in 1783 and 1786, respectively, Fuller gave one hundred pounds each to assist them in commencing a trade; the third son died young. The premises were rented and the rents received by Fuller until November, 1799, when he died. Part of the rents, reserved upon a lease for five years, commencing March, 1777, were paid in depreciated paper money, whereby a loss was sustained; and when the youngest son came of age, the annual interest of the money which Fuller had advanced beyond the rents, exceeded the annual rent. In 1789, two of the sons being dead and the third absent, Fuller expended upward of two hundred pounds in erecting a plain stone-house, and making necessary repairs on the land; and from this time the balance against the estate increased rapidly. Fuller was negligent neither in his attention to the children nor management of the estate. He often spoke of it as their estate, and mentioned it in one or two wills, afterward revoked. But it did not appear that Fuller told the children of their interest in the estate, upon their coming of age, nor did the plaintiff's lessors, who were the surviving brother and sister, ascertain the trust till Fuller's death, when the action was brought. Shortly before that, Fuller had offered to lease the estate for twelve years; and once told Lewis "people say the estate does not belong to me, but I say it does." At this time the interest on the money advanced by him so far exceeded the rent, that he probably took it for granted that the children could never redeem and that the estate would remain his property. He kept a regular account of the rents, and the advances, upon which he charged interest, and at the end of the year carried the balance to a new account. In some cases interest was charged upon interest by calculating it upon the balance, without stating that such balance was composed of interest. After the ejectment was brought the estate suffered from lack of attention, and but little rent was received therefrom.

If Fuller was not entitled to interest on his advances, nor to an allowance for the depreciated money, nor to the expenditures for building, and the residuary devisee was bound to answer the full value of the rents as if the place had been kept in good order, the trust owed him nothing. If on the contrary, he was so entitled, and the charges were to correspond with the actual receipts, the trust owed him the amount found by the jury, deducting the charges of compound interest which counsel had told the jury to rectify, but they had failed to do.

Gibson and M. Levy, in support of the motion. A trustee must execute the trust with fidelity and reasonable diligence; it is no excuse that he has received no benefit from it: *Charitable Corporation v. Sutton*, 2 Atk. 406. He is never allowed to profit by a breach of his trust: *Earl Powlet v. Herbert*, 1 Ves. Jr. 287. His neglect to do what he should have done shall not prejudice the *cestui que trust*: *Lechmere v. Earl of Carlisle*, 3 P. Wms. 315. Fuller neglected to inform the *cestui que trust* of their right, until, by the accumulation of principal and interest, the estate is not worth redeeming; in such cases, where the trustee has attempted to impose upon the trust, it is the rule to cut off interest from the sums advanced, except from the time of their liquidation by the master, and to make him pay costs: *Attorney-general v. Brewer's Company*, 1 P. Wms. 376. At the time Fuller made the advances, interest was not allowed on an open account: *Jacobs v. Adams*, 1 Dall. 52; *Henry v. Risk*, 1 Dall. 265; *Williams v. Craig*, 1 Dall. 315; *Willing v. Crawford*, 4 Dall. 289. It has been the uniform practice to deny interest where the account, like the present, has been unsettled for a long time, and made intricate by neglect: *Boddam v. Ryley*, 2 Bro. Chan. Ca. 239; *Barwell v. Parkes*, Id. 2. The rents to the full amount should be strictly charged without allowance for depreciation; and Lewis should be held responsible for injury to the estate. The buildings were unauthorized, and compound interest has been given.

Rawle and Ingersoll, against the motion, contended that the trustee would not gain anything from the trust by allowing him the full amount of his demands, as nothing was claimed for his trouble. When the *cestui que trust* came of age, Fuller's claim against the estate exceeded the rent, so that it would have been idle to propose a redemption. There was no breach of trust, as the charity was intended to last only during the minority of the children. That interest is always due for money lent and ad-

vanced, is now settled by *Crawford v. Willing*, 4 Dall. 289, contrary to the old rule, as contended for by plaintiff. Interest has been allowed the trustee after a greater lapse of time than in this instance: *Cecil's Lessee v. Korbman*, 1 Binney, 134. Allowance should be made for the depreciated money, as it was a legal tender. The buildings were necessary, and Fuller is entitled to reimbursement for money expended thereon. The compound interest is not claimed.

By Court, **TILGHMAN, C. J.** Several reasons have been urged by the counsel for the plaintiff in support of their motion for a new trial. These may be reduced to the following heads:

1. No interest ought to have been allowed on Fuller's advances;
2. No allowance should be made to Fuller for depreciated paper money;
3. No allowance should be made for money expended in buildings after the youngest child came of age;
4. The jury have allowed compound interest.

1. It seems to have been formerly held that interest was not allowable on an account for money lent and advanced. That opinion gradually declined, upon more mature reflection; and without citing particular cases, it may now be safely affirmed that for a considerable time past the settled law has been that interest is recoverable for money lent and advanced. Is there anything particular in this case to distinguish it from the general rule? Fuller has charged no commissions. I think he ought not. The honorable and charitable trust he had undertaken forbade such a charge. It may be said he would have been more charitable if he had charged no interest. True; but he was under no legal obligation to do so. It is material that the subscribers to the charity seem to have had no views beyond the maintenance and education of the children. They did not expect that there would be more than enough for this. The whole subscription amounted to four hundred and eight pounds fourteen shillings and threepence. It was left to the discretion of the trustees whether to invest the money in land or not. Now if it had remained in money it would have been expended as occasion required. After it was invested in land, either the object of charity must have been violated, or money must have been borrowed for the support of the children. If Fuller had borrowed, he must have paid interest, which would have fallen on the trust estate. Now where is the difference to the children, whether interest is paid to Fuller or to a stranger? There is no just cause of complaint because the jury have allowed interest;

2. On the second point, little need be said. The plain principles of justice demand that a trustee who has acted to the best of his judgment ought not to be money out of pocket. There is no ground for saying that Fuller wantonly received bad money. We know that during the war of the revolution it was not prudent to refuse the current paper. In consideration of this it is provided by act of assembly that guardians and trustees shall not be chargeable with losses occasioned by the receipt of such money. And if there was no act of assembly on the subject, I should not hesitate to say that the law would be the same;

3. As to the money expended in the buildings and repairs, Fuller would have acted with more prudence and propriety if he had informed the children, when they came of age, of the exact state of the trust, and taken their advice whether to keep the place any longer, or sell it at once, and thus close the business. If he had laid out the money in improper buildings, it would be but reasonable to throw part of the expense on him. But that was not the case. He made no other than plain and solid buildings, very necessary for the land, and by which its value has been greatly increased. It is certain that the balance against the trust estate has increased very much since the children came of age; and this increase has arisen altogether from those buildings and the interest on Fuller's account. But on the other hand, the children have the advantage of the great rise in the value of the land. If it appeared that Fuller had intentionally deceived them as to the nature of their rights, or that he had ever formed a design of making the estate his own, to their prejudice, it would be proper to punish him by striking from his account the expenditure for the buildings; but that not being the case, it is reasonable to allow it;

4. In the last objection to the verdict there is weight. Although we do not exactly know in what manner the jury stated the account, yet there is sufficient reason to suppose that in some instances they allowed charges of compound interest. But the defendant's counsel having consented to correct all errors of that kind, there is no occasion for a new trial. The court recommend that the account should be made out on each side, correcting the errors of compound interest. If the two accounts thus made out agree, it may be taken for granted that the calculation is right. If they differ, the court reserve the right of deciding between them.

On the whole of the case, the court think there is no cause

for a new trial, the defendant consenting to correct errors of compound interest under their direction.

New trial refused.

WILT v. FRANKLIN.

[1 BUNNELL, 502.]

CONVEYANCE, WHEN NOT FRAUDULENT.—A verdict for a large sum of money was obtained against a debtor; and on the evening of the same day he conveyed all his property to a trustee of his own choice for the benefit of all his creditors. The trustee lived at a distance of twenty-three miles, and did not learn of the deed until four days afterward, when he gave his assent. The debtor continued in possession of the furniture and goods the next day and part of the following day, when they were levied on at the suit of a creditor. The title deeds of the real estate also remained in the possession of the grantor for a period of nearly two months. It was held that the deed was valid and took effect from its execution.

SELECTION OF TRUSTEE.—Where there is no bankrupt act existing, a debtor may properly select his own trustee, and such trustee or assignee need not necessarily be one of the creditors.

SCHEDULE OF PROPERTY CONVEYED.—The want of a schedule of property conveyed by a general assignment for the benefit of creditors is a circumstance proper to be taken into consideration, but is not in itself conclusive evidence of fraud.

ACTION for money had and received, tried, under the general issue, before YEATES, J., at *nisi prius*, February, 1807, when the jury returned a special verdict, in substance as follows:

In an action on the case instituted in the supreme court of Pennsylvania, by Abraham Wilt against Matthias Keely, the jury gave a verdict for Wilt in the sum of nine thousand and sixty-two dollars and fifteen cents, at about four o'clock P. M. of Saturday, the third of March, 1804. Shortly afterward, and on the same day, a deed of bargain and sale was drawn up, transferring the real and personal estate of Keely to John Bartholomew, and on the night of that day, between nine and ten o'clock P. M., the deed was signed by Keely and his wife in the presence of two witnesses, and immediately thereafter acknowledged before Frederick Wolbert, Esq. Bartholomew was not present at the time of signing, nor had he any previous knowledge that such deed was to be executed; but resided twenty-three miles distant, and heard nothing of the alleged assignment until Wednesday, the seventh of the same month, when the assignment, together with a letter from Keely, was

shown to him by a messenger sent to his dwelling-house. On reading the letter and assignment, Bartholomew said that he was a friend of Keely's family, and was willing to oblige him in this respect; that he was very willing to serve, but that his illness would prevent his going to the city. The assignment was not given to the messenger to be delivered to Bartholomew until the evening of Tuesday, the sixth of March. Bartholomew was not a creditor of Keely, nor did he pay any money to Keely on the said third of March, or at any time afterward. No possession of the goods or lands, books or writings of Keely, was delivered to Bartholomew on the third of March, or at any time afterward; and Keely's family continued to reside in his dwelling-house after the supposed assignment, and Keely retained possession of his goods and furniture until Monday, the fifth of March. On the last mentioned day the sheriff of the city and county of Philadelphia levied on the goods and furniture of Keely at the suit of Peter Berthon and son. On the seventh of March, Keely was arrested for debt and confined in prison. On the tenth of March, Bartholomew, by authority of Keely's creditors, assigned the premises described in the deed of the third to Thomas Allibone and Caleb North, who afterward assigned to the defendant, Walter Franklin. The execution on Wilt's judgment was levied upon two messuages of Keely, the title deeds of which were not delivered to Bartholomew at any time, but remained under Keely's control, and were surrendered into the court of common pleas, on the twenty-sixth of April, 1804. None of the title deeds to the real estate belonging to Keely, included in the deed of third of March, were ever delivered to Bartholomew. If, upon the whole matter the law be with the plaintiff, the jury assess the damages in favor of the plaintiff in the sum of two thousand and thirty-seven dollars and fifty-eight cents, and six cents costs; if with the defendant, they find for the defendant.

The case of *Berthon v. Keely* was agreed to be argued upon the same special verdict, with the additional fact, the sheriff had, under the seizure found by the verdict, sold the goods and paid the proceeds into court. The question there was as to Berthon's right to the money in court. Both cases turned upon the validity and relation of the deed of third March, 1804, by which Keely and wife, in consideration of one dollar, bargained and sold his whole real and personal estate to Bartholomew, in trust that he should convert the same into money by public or

private sale, and apply the proceeds, after deducting costs, to and among all of Keely's creditors in equal proportions. The deed also gave power to assign part or all of the property to trustees, to be designated by the creditors, for the same purpose as mentioned in the assignment to Bartholomew; but did not contain or refer to any schedule or list of the property assigned, or of the debtors and creditors.

Phillips, M. Levy and Tod, for the plaintiffs, contended: 1. That the deed of third March, 1804, was void; because it was intended to defeat Wilt's verdict, and by stat. 13 Eliz. c. 5, deeds to delay, hinder or defraud creditors are fraudulent and void: *Cadogan v. Kennett*, Cowp. 434; because no possession was delivered to the grantee: *Thwyne's case*, 3 Co. 80; *Hungerford v. Earle*, 2 Vern. 261; *Edwards v. Harben*, 2 T. R. 587; *Wilson v. Day*, 2 Burr. 830; *Tarback v. Marbury*, 2 Vern. 510; because the trustee was a creditor and chosen by the debtor: *Burd v. Fitzsimmons*, 4 Dall. 77; *Alderson v. Temple*, 4 Burr 2240; because no money was paid by the grantee, therefore no consideration sufficient to raise a use: 2 Bl. Com. 330; *Monnington v. Williams*, 1 Vent. 108; *Stream v. Seyer*, 1 Ld. Raym. 111; *Sargent v. Reed*, 2 Str. 1229; because there was no schedule annexed: *Burd v. Fitzsimmons*; and no time is limited for the execution of the trust; 2. If the deed be considered valid it must take effect from the assent of the grantee; and the doctrine of relation will not carry the operation of the deed back to its date to the wrong of a third person: *Hall v. Casenove*, 4 East, 481.

Rawle and Ingersoll, for the defendant. An assignment for the purpose of an equal distribution among the creditors of an insolvent debtor is favored in law. Fraud is not found by the verdict, nor is it to be presumed from the facts in this case; and to make a deed fraudulent within 13 Eliz. there must be an actual *mala mens*: *Chancellor of Oxford's case*, 10 Co. 56; *Teynham v. Mullens*, 1 Mod. 119; *Russel v. Hammond*, 1 Atk. 15; *Cadogan v. Kennett*, Cowp. 545. The delay, urged by opposing counsel, was lawfully produced to obtain an equal distribution among all the creditors: *Holbird v. Anderson*, 5 T. R. 235; *Nunn v. Wilsmore*, 8 T. R. 528; *Meux v. Howell*, 4 East, 1. The registry acts have obviated the necessity of the delivery of title deeds, and the act of one of the plaintiffs prevented a delivery of personal property. The deed expresses a consideration of debts: *Nugent v. Gifford*, 1 Atk. 463; and also the receipt of

one dollar, and no averment will lie against that which is expressly affirmed in the deed: *Shep. Touch.* 223. The want of a schedule has never been held a substantial objection to a deed. In this case, where the deed was for the benefit of others, an acceptance by the grantee is presumed until a disagreement is shown, and the estate was out of the grantor *eo instanti*, the execution was complete: *Thompson v. Leach*, 2 Vent. 198; 1 Show. 308.

TILGHMAN, C. J. These causes come before the court on a special verdict found in the action in which Wilt is the plaintiff. In the action by Berthon and son, it is agreed that it shall be decided on the facts found in the verdict in Wilt's suit.

Two points were made by the counsel for the plaintiff: 1. That, under the circumstances stated in the verdict, the deed from Matthias Keely to John Bartholomew is to be considered as fraudulent and void; 2. That, supposing it to be good, it had no operation till the seventh March, when it was first made known to Bartholomew, and received his assent.

In support of the first point, it was contended that the deed was void by the stat. 13 Eliz. c. 5, and by the principles of the common law; because it was made with an intent to defeat the action of Wilt, who had obtained a verdict against Keely the same day the deed was executed; because it was not attended with delivery of possession of the property conveyed; because it vested the management of Keely's whole estate in a trustee of his own choosing; because there was no schedule of the property; and because no money was paid by Bartholomew to Keely. I will consider this subject under two points of view, which will include the different positions taken by the plaintiff's counsel:

1. What was the intent of the parties? 2. In what manner had their intent been carried into effect?

1. As to Bartholomew, the grantee, there is no intimation of his having entered into any improper collusion with Keely. He knew nothing of the deed till after its execution, and it does not appear that he was any way interested in it. The manifest intent of Keely was to prevent Wilt from obtaining any preference by his judgment, and to put all his creditors, without exception, on an equal footing. There appears to be nothing immoral or unfair in such an attempt. On the contrary, it is the object of all well-regulated societies where commerce flourishes to obtain an equal division of the property of insolvent traders. The statute of 13 Eliz. c. 5 (the provisions of which go no further than the common law as now understood), never had it

in contemplation to invalidate a fair transaction. It was made to avoid fraudulent conveyances intended for the purpose of defeating, hindering or delaying creditors of their just debts. The parties to such conveyances were considered as criminal, and subject to a penalty, to be recovered by action of debt or information. The statute is declared to be made for the purpose of avoiding "feigned, covinous and fraudulent conveyances, bonds, suits, judgments and executions, which were devised and contrived of malice, to the end, purpose and intent to delay, hinder or defraud creditors and others of their just and lawful actions, suits, debts," etc. There is nothing in the statute to hinder a man from giving a preference to any creditor he pleases before or even after an action brought against him. It was never supposed that it would prevent an executor from preferring one creditor to any other of equal degree by a voluntary confession of judgment, although the creditor who brought the first suit was thus entirely defeated. An executor, indeed, could not give a preference to a debt of an inferior nature; but that was because he would thereby be guilty of a *devastavit*, a reason which does not apply to the case of debtor and creditor who are both living. It was expressly decided in *Holbird v. Anderson*, 5 T. R. 235, that a debtor being sued to judgment by one of his creditors, might, before the time when execution could be taken out, prefer another creditor by a voluntary confession of judgment, by virtue of which an execution was immediately sued out and levied on the goods of the debtor. In *Nunn and Ladbroke v. Wilsmore*, 8 T. R. 529, 530, Lord Kenyon declares his opinion that, "putting the bankrupt laws out of the case, a debtor may assign all his effects for the benefit of particular creditors." Now, if preferences of this kind are lawful, much more so in an act which gives a preference to no creditor, but prevents any one from obtaining a preference, and puts all on an equal footing. It may be objected, that this case comes within the words of the statute, because Wilt has been hindered, delayed, and, in part, defeated by this deed. It is true he has been delayed and partly defeated, but not in a fraudulent manner. We must give the statute a reasonable construction. Wilt would have been delayed and partly defeated if, immediately after the commencement of his suit, Keely had, with the consent all his other creditors, executed a deed to trustees of the creditors' own choice, for the purpose of disposing of his estate, and dividing the proceeds equally among them. But I imagine no one would contend that in such a case the conveyance was not good.

For the reasons which I have given, and many others which might be given, I conclude that the intent of Keely, so far as it appears by the verdict, was fair and lawful. 2. Let us next consider the means by which he carried his purpose into effect. He executed a conveyance of all his property, without specifying it, to a trustee of his own choosing, with power to the said trustee to convey part or the whole of the said property to another trustee or trustees under the control and direction of his creditors. Keely and his wife immediately acknowledged the deed before a judge of the court of common pleas of Philadelphia county. This was on Saturday night. On Monday following he confessed judgment to Berthon and son, who immediately took out a *fi. fa.* and levied on his goods still remaining in his possession. On Tuesday night the deed was given by Keely to a messenger to be carried next morning to Bartholomew, who lived twenty-three miles off; and on Wednesday it was delivered to Bartholomew, who then for the first time was made acquainted with it and who consented to act as trustee. By the execution of the deed Keely irrevocably parted with all power over his estate. And it is to be remarked that the transaction was not secret. The judge who took the acknowledgment must have been privy to the contents of the deed, because the law required him to make the contents known to Mrs. Keely when he took her acknowledgment.

As the counsel for the plaintiff relied a good deal on the case of *Burd v. Fitzsimmons etc.*, decided in the high court of errors and appeals in this state in support of some of their objections under the head which I am now considering, I think it proper to mention that the point decided there is very little to the present purpose, because the two cases are essentially different. In that case a time was fixed within which the creditors were required to give their assent to all the conditions of the deed. The shares of those who did not express their assent were to be paid over to Mr. McClenachan, the person who made the conveyance and who was notoriously insolvent; and there was reason to suppose that it would have been almost impossible for the whole of the creditors to receive notice of the deed and signify their assent within the limited time. The authority of that case goes no further than the main point decided. As to the reasons on which the different judges founded their opinions they were various. I will now consider the particular objections urged by the plaintiff's counsel in the case before us: 1. The trustee was chosen by the debtor himself. Although it is most

prudent and proper to consult the creditors as to the choice of a trustee when it can be done without great inconvenience, yet where there is no bankrupt law existing (which is our present situation), I know of no law which forbids the debtor to make the choice himself. There is no occasion now to decide whether under certain circumstances the choice made by the debtor would not be conclusive proof of fraud; as where the trustee should be an intimate friend or near relation of the debtor, desperate in his fortune and of notoriously bad character. No imputation whatever is thrown on the trustee here; and it is of some weight that the deed contained an opening for a choice to be made by the creditors which in fact afterward took place. It is to be remarked, too, that had Keely waited to consult his creditors after Wilt obtained his verdict, the judgment would have been entered and the preference of Wilt, as to the real estate, been established. Under the bankrupt system in England an attempt by an insolvent trader to throw the management of his affairs into the hands of a trustee of his own choice is in direct violation of the whole spirit and system of the laws, and therefore amounts in itself to an act of bankruptcy. Many cases of that kind were cited; but they are inapplicable, being founded wholly on the English statute law.

2. As to the want of a schedule. It is very desirable that conveyances of property should be accompanied with schedules. They are a great convenience to creditors and a check upon fraud in the debtor. But they are more necessary where part of a man's property is conveyed to particular creditors, than when the whole is conveyed for the benefit of all; and I am satisfied that many conveyances of the latter description have been made without schedules, and proved very beneficial to the creditors. The want of a schedule is a circumstance proper to be taken into consideration; but I cannot think that it is in itself conclusive evidence of fraud.

3. The next objection is the non-delivery of possession; this applies only to the goods. I agree, that in general, the continuance of possession in the grantor is one of the strongest marks of fraud, especially if such possession continues a considerable length of time. I agree, too, that in many cases, possession has been adjudged to make a conveyance fraudulent, where no actual fraud, no criminal intent, was supposed to exist. Although the statute, 13 Eliz., as I mentioned before, is bottomed on the supposition of an immoral intention, yet it has been adjudged necessary to determine that certain circum-

stances, which in their nature tend to deceive and injure creditors, shall be considered as sufficient evidence of fraud. Such was *Twyne's case*, the leading case on possession, where the creditor to whom a general conveyance of the debtor's whole property was made in satisfaction of a just debt amounting to more than the whole property, suffered the debtor to retain the possession, to use the property as his own, to dispose of what he pleased of it, and to put his own mark on the sheep. There is no searching the heart of man; but a possession of this kind tends so directly to deceive the world that it was fair to conclude that the conveyance in *Twyne's case* was attended with some secret trust for the benefit of the debtor. Possession is not always in itself conclusive evidence of fraud, but it is open to explanation. In the case before us, the deed was executed late on Saturday night. Sunday is not a day of business. The trustee lived twenty-three miles off. On Monday, the goods of the debtor were levied on by Berthon and son. Being in custody of the law, the necessity of a delivery to the trustee was less urgent. Indeed I do not see how a delivery could then have been made. All that could be done, was to inform the trustee what the goods were; and that they had been taken in execution. Under these circumstances, I think the non-delivery of possession is sufficiently accounted for.

4. The last objection, to the validity of the deed, is that no money was paid by the grantee. I do not think this objection can be supported. The bargainee undertakes to pay the whole proceeds of the estate to the creditors of the bargainor, for his benefit. But independent of that, as the objection is merely technical, and applies only to the form of the conveyance, it is answered by the opinion of Anderson, justice, in *Smith v. Lane*, 1 Leon. 170, and of the whole court in *Fisher v. Smith*, Moore, 569, that if a consideration of money is expressed in a deed of bargain and sale, there shall be no averment or evidence received to the contrary. I adopt this principle so far as to support the formal part of the conveyance, to go farther, is not necessary.

Having thus considered the principal objections to the deed, my opinion on the whole is, that it is valid. It only remains to determine at what time it took effect; whether on its execution, or on the Wednesday following, when the assent of the grantee was expressly given. This does not appear to me to be a point of much difficulty. The plaintiff's counsel concede, that where the deed is for the benefit of the grantee, it is reasonable that

his assent should be presumed. They were right in this concession. I think it reasonable to make the same presumption, where the grantee is required by the deed to do an act useful to his neighbor, and not injurious to himself. This presumption is liable to be rebutted by showing an express dissent. A man cannot be forced to accept a conveyance against his will. But, in the present instance, the presumption is confirmed by the assent of the grantee, the moment he was informed of the conveyance. I am, therefore, of opinion that it took effect from the execution on Saturday night; of course, it is not subject to the lien of the judgment of the plaintiff Wilt.

Upon the whole of the special verdict, my opinion is in favor of the defendant.

YEATES, J. If the assignment made by Matthias Keely to John Bartholomew, in trust for all his creditors, "in just and equal proportions according to their respective demands, without any preference or advantage to one more than another," can be sustained at law, to take effect from its date, the necessary consequence will be that judgment must be entered for the defendant; because the assignment is prior, in point of date, to the judgments under which the plaintiffs severally claim. But the assignment is attempted to be impeached on several grounds, which I shall separately consider.

1. It has been objected that there is no good consideration to give validity to the assignment, the jury having found that no money was paid by the trustee to Keely. The instrument recites that "Keely owed, and was justly indebted, unto divers persons in divers sums of money, but being incapable to pay off and discharge the same to their full amount, was nevertheless desirous, so far as lay in his power, that they should be satisfied in just and ratable proportions, according to their respective demands;" and that in consideration as well of the premises as of seven shillings and six pence, in hand paid by the said J. B., the receipt whereof was thereby acknowledged, did grant, etc. In reason and sound sense, money honestly due from the party assigning is equivalent to money paid down; and we have Lord Hardwicke's authority that it is a good consideration: 1 Atk. 463, 464. Other judges have adopted the same doctrine, and have said, 8 T. R. 529, "that in deciding questions of this kind, the courts have always disavowed inquiring, whether or not the consideration be equivalent; they will not weigh it in very nice scales if it be an honest transaction." Very small considerations have been holden sufficient

to give validity to a deed. Besides, the assignment expressed that seven shillings and six pence was paid by the trustee. This is sufficient to raise an use under the statute; and though it is inserted in the special verdict that no money was paid, it is clearly settled, Dyer 90; Shep. Touch. 222, 223, that there can be no averment against the consideration contained in a deed so as to effect its binding force; and consequently it is not susceptible of proof

2. It has been urged that the assignment took no effect until the seventh March, when Bartholomew assented thereto, and therefore the judgments, entered on the fifth March, have their full operation. To this it is answered, that the assent, of the party that takes, is implied in all conveyances, by intendment of law, till the contrary appears; and that this is as strong as the expression of the party. *Stabit praesumptio donec probetur in contrarium*: 2 Vent. 202. This doctrine has been asserted by Ventris, justice, in his elaborate argument in the much disputed case of *Thompson v. Leach*, 2 Vent. 198; 1 Show. 296; 3 Lev. 284, which commenced in the common pleas, was afterward carried by writ of error into the king's bench, 3 Mod. 296, and was finally determined in the house of lords, upon the reasons contained in the argument of Ventris; so that his opinion finally prevailed: 1 Show. Par. Ca. 150. In *Meux and others qui tam v. Howell and Atlee*, 4 East, 9, Lawrence, J., asks the plaintiffs' counsel these questions during their argument: "May not a person indebted to several, without the imputation of fraud, confess a judgment to a trustee, to enable him to take all his property for the benefit of all his creditors equally? Does not a court of equity act upon the same principle, in the distribution of assets? And why should there be a previous consent of the *cestuis que trust*, if they consent afterward?" The fact, moreover, is, that here was an acceptance of the trust, in a reasonable time after it was created. The trustee lived twenty-three miles from Keely. The assignment was executed on Saturday night of the third March, at ten o'clock. On Monday, the fifth, the goods and furniture were levied on by the sheriff at the suit of Peter Berthon and son. On Wednesday the seventh, Bartholomew accepted the trust, and on the tenth, pursuant to a provision contained in the deed, he assigned the same to Thomas Allibone and Caleb North, who had been elected by the creditors. On legal principles, therefore, the acceptance will refer back to the execution of the deed, and form one transaction, done at the same time.

3. It is objected that Bartholomew was no creditor, nor elected by the creditors in general to take the assignment. I do not see how his not being a creditor can detract from the validity of the instrument. If, indeed, the assignee had been insolvent, or was incompetent to the execution of the trust, it would afford strong evidence of meditated fraud: but neither of these facts is found by the special verdict; and they cannot be presumed. Besides, this assignment contained a proviso, that Bartholomew should "grant and assign the premises, or any part thereof with the appurtenances, to one or more trustees, under the control and direction of the creditors." And it is found by the special verdict, that in pursuance thereof, the said John Bartholomew assigned the premises to Thomas Allibone and Caleb North, on the tenth March following, who had been authorized by a meeting of the creditors to take the said assignment. This brings the case within the law maxim, *omnis rati-habitio retrotrahitur et mandato aequiparatur*.

4. It has been insisted that no time has been limited within which the execution of the trust should be completed. The words of the assignment as to this point are, "that the trustee shall forthwith take possession and seisin of the premises, and within such convenient time as to him shall seem meet, by public or private sale, for the best price that can be procured, convert all and singular, the estate, real, personal, and mixed, into money, and shall, as soon as possible, collect all and singular the debts and sums of money above assigned, and, after deducting the costs and charges of the trust, shall pay and apply all the moneys arising therefrom," etc. The force of the objection is greatly taken off, by the provisions of the act of twenty-second of January, 1774: 1 St. Laws, 690. The commissioners appointed by the courts of common pleas, have sufficient powers to oblige the trustees and assignees of insolvent debtors to execute their trusts, and can prevent all unreasonable delays. Where the estate of a person who has failed in trade, is scattered and dispersed in different places, it is next to an impossibility to fix a period of time within which all his accounts can reasonably be expected to be adjusted, and in the cases of debtors discharged under the insolvent acts, no period is ever fixed within which the assignees shall close their trusts.

5. It has been further insisted that the goods of Keely, and his real estate and the title deeds did not pass into the hands of the assignee, and that the debtor's continuance in possession is a mark of trust, if not of fraud. I agree the general rule to be,

that in the transfer of chattels, 2. T. R. 594; 2 Bro. Chan. Ca. 650, unless possession accompanies and follows an absolute deed, it is fraudulent and void as to creditors; and that the vendor's continuing in possession is inconsistent with such deed. Yet there are cases where, though possession was not delivered at the time the conveyance was not held to be fraudulent. To form a correct judgment on this head, we must distinctly mark the different events, as they occurred in the order of time. On the third of March the assignment was executed and acknowledged between nine and ten o'clock at night, Bartholomew not being present. This was on Saturday. The goods and furniture of Keely remained in his possession the residue of that night, and until Monday morning, when the sheriff levied on them at the suit of Peter Berthon and son. On Tuesday, the sixth, the assignment was sent on to Bartholomew, who accepted it on the next day; and on the same day Keely was imprisoned for debt. On the tenth of March Bartholomew assigned to North and Allibone, in pursuance of the requisition of the general creditors. An execution in the house would prevent the assignee from taking possession of any part of the property on Monday; and it would be straining matters very hard to suppose that Keely obtained any false credit by the goods and furniture continuing in the house as usual, the small remnant of Saturday and the whole of Sunday. It is not found that he either bought or sold, or in any way dealt during that interval; nor that the title deeds of his real estate were fraudulently withheld from his assignee. It has been resolved that not taking possession is only evidence of fraud, 1 Burr. 484, and like other equivocal facts may be explained by circumstances. As to the title deeds being retained by Keely, this circumstance would have the same effect here, as it possibly might in England, where they have no general statute for the registry of deeds, and it has been determined at *nisi prius* at Reading in May, 1792, between *Evans, executor of Evans v. Jones et ux. administrators of Nicholas*, that it was not necessary that mortgagees should have possession of the title papers.

6. Lastly, it has been objected that no schedule accompanied the assignment. Much stress has been placed on the decision of the case of *Burd, plaintiff in error, v. Fitzsimmons et al.*, in the high court of errors and appeals: 4 Dall. 76. As I understand that case, the majority of the judges determined the assignment of Mr. McClenachan to be invalid on several grounds, but chiefly, as I apprehend, on this, that under the terms of

the deed a trust resulted to the debtor himself for the proportions of all such creditors as should not agree in writing to accept thereof, within the period of nine months from the date. The creditors were widely dispersed, many of them were beyond sea, and the assignees were not provided with the means of executing the trust reposed in them. It is true, two of my brothers were of opinion that there should have been a schedule annexed, designating the creditors, or explanatory of the debts and property. But with all due deference, I would observe that I can find no positive rule of law or commercial usage which imperiously demands a schedule of creditors or property to confer a validity on a general assignment. I can find no such precedent in the books, nor have any such occurred to me while at the bar or on the bench. I admit that such a list may contribute to facilitate the labors of the assignee; but the question now is whether it be essentially necessary. If the books of the debtor have been well kept, they would afford much better sources of information than any schedule; if ill kept, no man of extensive dealings can possibly know the true state of his accounts with individuals. In most cases the demands of creditors on the spot can be ascertained by convening them together. It cannot be denied that this assignment was made for the express purpose of preventing a preference to the plaintiffs in these suits; or, in other phrase, of putting the creditors in general on one common footing, without any kind of priority. That this was an immoral act, will not be asserted. Was it then illegal, and prohibited by the words and spirit of the statute 13 Eliz. c. 5?

That act as well as the statute 27 Eliz. c. 4, is in affirmance of the common law, whose principles and rules as they are now universally known and understood, would, according to Lord Mansfield, Cowp. 434, have attained every end proposed by those statutes. The question in every case is, whether the act done is a *bona fide* transaction; or whether it is a trick and contrivance to defeat creditors. The plaintiff's counsel have urged that this assignment was made "to the end, purpose and intent to delay, hinder or defraud creditors or others of their just and lawful actions," etc. But Lord C. J. Ellenborough has declared in *Meux qui tam. v. Howell*, "that it is not every feoffment, judgment, etc., which will have the effect of delaying or hindering creditors of their debts, that is, therefore, fraudulent within the statute. For such is the effect *pro tanto* of every assignment that can be made by one who has creditors. Every

assignment of a man's property, however good and honest the consideration, must diminish the fund out of which satisfaction is to be made to his creditors. But the feoffment, judgment, etc., must be devised of malice, fraud or the like, to bring it within the statute." Were there, then, in the words of the statute, "malice, fraud, covin, collusion, or guile," in the present instance, "to the intent to delay, hinder, or defraud creditors, not only to the let or hindrance of the due course and execution of law and justice, but also to the overthrow of all true and plain dealing?" The trust is in express words, "for the use of all the creditors in just and equal proportions, according to their respective demands, without any preference or advantage to one more than another." In every civilized country in Europe, it has been anxiously attempted to effect an equal distribution of the property of insolvent persons. In Great Britain it is said by Lord Mansfield, 1 Burr. 476, that the whole bankrupt law has two main objects in view, to wit, the management of the bankrupt's estate, and an equal distribution among his creditors. Such was the spirit of the system of bankruptcy of the United States under their act of April, 1800; and such was the spirit of the laws of this state, passed anterior to the adoption of the constitution of the United States. I cannot bring myself to believe that a conformity to such laws can be denominated either an actual or legal fraud, and shall conclude with the strong expressions of Grose, J., in *Meux v. Howell*, before cited: "Here there is nothing like a fraud; and it makes one shudder to think that persons who appear, like the defendant, to have acted most honestly, should have been in any hazard of being subjected to punishment for having endeavored to procure an equal distribution of his property amongst all his creditors."

My opinion is, that judgment should be entered for the defendant in both suits.

BRACKENRIDGE, J., delivered a dissenting opinion.

Judgment for defendant.

This case was referred to by Gibson, C. J., in *cKinney v. Rao de, & Watts*, 345, where he says: "No case has carried the doctrine further except *Wilt v. Franklin*, and had the point there been want of intermediate delivery instead of want of intermediate assent it would probably have produced a different result." In *Eyrick v. Hetrick*, 13 Pa. St. 494, it is cited to show that a trustee is presumed to have accepted the instrument creating the trust until the fact be disproved. From the frequency of the citation of this case on the subject of fraudulent conveyances it is easily seen how

important a case it is on this subject. Thus Bump in his work on Fraudulent Conveyances cites it no less than eleven times. At page 21, he says: "A preference or an assignment for the benefit of creditors may be made for the express purpose of defeating an execution. The creditor may be baffled or even eventually lose his debt, but there is no obstacle interposed between him and any property which belongs to the debtor."

SHAFFER v. KINTZER.

[1 BENEY, 537.]

ASSESSMENT OF DAMAGES IN SLANDER.—Where entire damages are assessed upon several counts in an action of slander, one of which is bad, the judgment will be reversed and a *venire de novo* awarded.

WHAT WORDS ARE NOT ACTIONABLE.—Saying of a man "he has sworn false," is not actionable, the colloquium being of an extra-judicial affidavit before a justice of the peace; nor are the words helped by an innuendo of perjury.

WRIT of error from the common pleas of Berks county. Kintzer, the plaintiff below, brought an action of slander against Shaffer; the declaration contained four counts: 1. That Shaffer, maliciously contriving and intending to bring plaintiff within the laws enacted for the punishment of perjury, falsely published concerning the testimony plaintiff had given in an action before a justice of the peace empowered to administer an oath, these defamatory words: "He has sworn false." 2. This count was the same as the first except that the words were laid, "You have sworn false." 3. That Kintzer, on the application of Shaffer, did declare on oath before a justice of the peace having authority to administer an oath, that he had not relinquished a certain wager before that time made; nevertheless, Shaffer, intending to scandalize plaintiff, falsely and maliciously spoke and published concerning said oath the following false and defamatory words: "He has sworn false," with an innuendo that plaintiff had committed perjury. 4. This count followed the form of the third, laying the words in the second person. The jury found a general verdict for the plaintiff and assessed entire damages. The general errors were assigned and the question was whether the declaration contained any cause of action.

Evans and Ingersoll, for the plaintiff in error, contended that in the action mentioned in the first and second counts, Kintzer was a party, and an oath could not be lawfully administered to him. The words in the third and fourth count are not actionable; "you have sworn false," being the same as "a for-

sworn man," which do not import perjury: 3 Burn. Just. 229; 3 Inst. 166; *Gore v. Moorton*, Cro. Eliz. 905; *Stanhope v. Blith*, 4 Rep. 15 a; *Holt v. Scholefield*, 6 T. R. 694; and they were spoken of an extra-judicial affidavit wherein perjury could not be committed: 2 Hawk., lib. 1, c. 69, sec. 4; 4 Bl. Com. 136. The judgment must be reversed if one count be found bad, as the damages are entire.

Frazer urged that the only doubt could be as to the *colloquium* in the third and fourth counts; the doctrine of *mitiori sensu*, contended for by the plaintiff having been long exploded: Bull. N. P. 4; *Beavor v. Hides*, 2 Wils. 300. That the party himself swore, is no objection: *Colome's case*, Cro. Jac. 204. That it is slanderous to charge a man with being forsworn before a justice of the peace is recognized in *Gurneth v. Derry*, 3 Lev. 166; *Ward v. Clark*, 2 Johnson, 10. The innuendo, however, imputes perjury, which must be taken as true after verdict: *Rue v. Mitchell*, 2 Dall. 58 (1 Am. Dec. 258).

TILGHMAN, C. J., after reviewing the facts as above set forth, proceeded. The objection to these counts is, that it is not alleged that any cause was depending before the justice, in the course of which the oath was administered. On the contrary, it would seem that no cause was depending, but that the plaintiff took the oath voluntarily at the request of the defendant. In order to constitute perjury there must be a "lawful oath administered in some judicial proceeding." False swearing in a voluntary affidavit, made before a justice of the peace, before whom no cause is depending, is not perjury; nor can it be punished by indictment, although it is a very immoral and disgraceful action. With regard to words which will support an action of slander, I take the rule to be as laid down by De Grey, C. J., in the case of *Onslow v. Horne*, in the year 1771, which is an authority in this court. They must contain an express imputation, "of some crime liable to punishment, some capital offense, or other infamous crime or misdemeanor." This rule is recognized and approved by the court of king's bench, in *Holt v. Scholefield* (1796), in which it was held that it was not actionable to say that a man had "forsworn himself," meaning that he had committed perjury. But it has been urged, by the counsel of the defendant in error, that the defect in the words is cured by the innuendo of perjury, which the jury have found to be true. It is the office of an innuendo to elucidate the words by connecting them with the subject to which they refer,

and averring a meaning not inconsistent with or contradictory to them; but it cannot alter the nature of the words. If it say of B. that he cut down and carried away one of his trees, innuendo that B. committed felony, this will not make the words actionable, because they do not in their nature import a felony. The case of *Rue v. Mitchell*, 2 Dall. 58 (1 Am. Dec. 258), was cited and relied on by the counsel for the defendant in error. In that case the words were, "you have taken a false oath before Squire Rush," meaning that the plaintiff had committed perjury in an oath taken by him before William Rush, one of the justices, etc., in a cause before him depending. The court were of opinion that the action might be supported, and laid considerable stress on the innuendo, which the jury had found to be true. There is this remarkable difference between that case and the one before us, that there the innuendo expressly asserted that the oath was taken in a cause depending before the justice; but in this case the innuendo contains no such averment. Besides the third and fourth counts of the declaration, in the present case, describe the proceeding before the justice in such a manner as to make it appear that no cause was depending; and if the innuendo contradicted it, it is of no avail. I think the case of *Rue v. Mitchell* extended the efficacy of an innuendo far enough; rather farther than any former case had done; and I am not for going beyond it. If innuendos can alter the meaning of words, they may be employed to very mischievous purposes. A man may be made responsible not for what he said, but for what other persons may suppose he intended to say.

I am of opinion, on the whole, that the judgment in this case must be reversed, because the words charged in the third and fourth counts are not actionable.

YEATES, J., concurred.

BRACKENRIDGE, J. In the case of *Rue v. Mitchell*, "it appeared on the trial of the cause that the oath in question was voluntarily taken by the plaintiff, in order to satisfy the defendant upon a controverted fact involved in the suit." The voluntariness spoken of here is not of a nature with that which is properly called a voluntary oath; for there was a suit depending before the justice, and of which he had jurisdiction.

The jurisdiction of the justice in civil matters not being of common law origin, but taken from the civil law, where the judge determines the fact as well as the law, it has not been the

understanding, under the acts establishing his jurisdiction, that he is bound by every rule of common law evidence, but that he may exercise, and it has been the usage to exercise, a chancery power in purging the conscience by admitting an oath on the part of the plaintiff in support of his demand, or an answer upon oath on the part of the defendant. And even in courts of justice and before a jury, if a party plaintiff or defendant waives the strict rule in regard to testimony, and offers to leave a matter to the oath of his adversary, I do not know that the court could reject it, the party called upon being willing to make the oath. For it is a renunciation, by the party, of a right which the law has introduced for his sake. Yet such could not be called a voluntary oath; for though the court or justice before whom it is taken could not impose it, yet it is imposed by the allegation which the oath is admitted to repel. Such was the occasion of the oath in the case of *Rue v. Mitchell*, and it was legally administered. Perjury was both imputable and punishable in such a case. Law wager still exists in our law; and under certain forms of action the defendant at this day, in courts of justice, would have his privilege to repel, on his own oath and that of others, the allegation of the plaintiff. These oaths, though in a certain sense voluntary, would not be extrajudicial.

An oath administered by a justice where he has no jurisdiction, cannot be distinguished from an oath administered by one not a justice; for the proceeding of any tribunal of a civil nature must be founded on the plaint of a party; and where this tribunal proceeds without plaint, or entertains a plaint over which it has no cognizance, there is, in contemplation of law, no proceeding before it; and an oath taken in such a case is extrajudicial. A justice has no jurisdiction even on plaint made, where the jurisdiction is not given by positive statute, or where it is excluded by those principles which exclude the jurisdiction of every judicial forum; as where cognizance of the plaint is against public policy or general convenience. Where a matter actually exists in dispute, and, superseding all necessity of process, it is agreed to be referred to the oath of a party, on a certain particular, the oath will not be extrajudicial, provided the matter in dispute be of such a nature as is within the cognizance of the justice; for it is an agreement of the parties to terminate the controversy in this way. I will not say that, even if the justice had not cognizance of the matter on the ground of cause of action, from the subject of the controversy,

or from the quantum of the demand, an oath on such an agreement might not be administered to the parties, or to a witness offered by them, and agreed upon to be admitted; as in the case of a wager respecting an election, or the defect or infirmity of a third person. No prosecution would lie on an allegation of perjury in such a case; nor would an action of slander lie for an imputation of perjury in such a case. The law throws it entirely out of its protection, and can take no notice of it unless as a misdemeanor in the officer who administers. The law takes no notice, says Blackstone in his Commentaries, of any perjury but such as is committed in some court of justice having power to administer an oath; or before some magistrate or proper officer invested with similar authority, in some proceeding relative to a civil suit or a criminal prosecution. For it esteems all other oaths unnecessary at least, and therefore will not punish the breach of them. For which reason it is much to be questioned how far any magistrate is justifiable in taking a voluntary affidavit in any extrajudicial matter, as is now too frequent upon every petty occasion, since it is more than possible that by such idle oaths a man may frequently, in *foro conscientias*, incur the guilt, and at the same time evade the temporal penalties of perjury: 4 Bl. Com. 137. And Coke, in his Institutes, lays it down as has been quoted, that where the court has no authority to hold plea of the cause, it is *coram non judice*: 3 Inst. 166, cites Bract. lib. 4, fo. 180.

To apply these principles to the case before the court. The words laid to be spoken are "that he swore falsely." These words do not, of themselves, necessarily import a charge of perjury, or any indictable offense. "Perjury is a crime committed when a lawful oath is administered by any that hath authority, to any person in any judicial proceeding, who sweareth absolutely and falsely in a matter material to the issue or cause in question, by their own act, or by the subordination of others." 3 Inst. 164. "If a man calleth another a perjured man, he may have his action upon the case, because it must be intended contrary to his oath in a judicial proceeding; but for calling him a forsworn man, no action doth lie, because the forswearing may be extrajudicial:" 3 Inst. 164. And to say generally that a man hath forsworn himself, is not actionable; because he may be forsworn in common conversation, or it may be an expression of mere passion and anger: 4 Co. 15 b; nor shall it be intended to be referred to a case where perjury may be committed.

It may be said, that after a verdict, it shall be taken to have

been in evidence, that the oath, which was spoken of by the defendant, and said to have been sworn falsely, had been taken in the course of a judicial proceeding, and legally administered, but the introductory averment, as well as the *colloquium*, showed that the supposed defamatory words were applied to a mere voluntary oath, extrajudicially and illegally taken. So that it appears to me, the errors assigned in this cause are supported, and warrant a reversal of the judgment.

Judgment reversed.

Counsel for defendant then moved for a *venire de novo*, as two of the counts were good; and relied upon *Grant v. Astell*, Doug. 731.

TILGHMAN, C. J. I believe there is a late case in which a *venire de novo* was refused in slander; but I see no reason for the distinction. The case in Douglas is good law and good sense, and I am willing to abide by it.

Venire de novo awarded.

See the case of *Hopkins v. Beedle*, ante, 191, where a similar decision is made.

GARRIGUES v. COXE.

[1 BROWNE, 592.]

WHEN RISK BEGINS.—Upon an insurance “at and from” a foreign port the risk commences as soon as the vessel has been safely moored twenty-four hours after her arrival at port.

SEAWORTHINESS.—Upon an insurance “at and from” a warranty of seaworthiness must be referred to the commencement of the risk; and if between that time and the time of sailing she becomes unfit for sea, without the fault of the insured, and is afterwards lost by the perils of the sea, the insured can recover.

PERIL WITHIN POLICY.—A leak occasioned by rats, without the neglect of the captain, is a peril within the policy.

ACTION on a policy of insurance for six hundred dollars upon the brig *Malleville*, valued at two thousand dollars, at and from Cape François to Philadelphia. The policy was executed on the eleventh December, 1801, and contained the following clause: “If the above vessel, after a regular survey, should be condemned for being unsound or rotten, the underwriters shall not be bound to pay their subscriptions upon this policy.”

The following facts appeared upon the trial at *nisi prius* before Chief Justice Tilghman. The brig arrived at Cape François

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October 12, 1801, and sailed upon the voyage insured on the tenth November, 1801; on the following day, without any bad weather, sprung a leak; in consequence of which she put back, and arrived at Cape François on the fifteenth. Her cargo was then removed and a survey ordered. The surveyors reported that the sides were in bad condition from stem to stern, and the ribs and timbers so eaten by rats as to be unfit to hold the nails for replacing the planks. Repairs to the extent of six hundred dollars were thought necessary by the surveyors who, however, recommended a second survey before the repairs were ordered. As the result of the second survey, the surveyors reported that the plank and timbers were very inferior, and the brig in such a state, that the necessary repairs would exceed her value when repaired; and recommended that the vessel be condemned and sold at auction for the benefit of those concerned. The sale was thereupon ordered, at which the brig produced two hundred and forty-two dollars and fifty cents.

The deposition of one of the surveyors was read, from which it appeared that at the first survey the leak was not discovered; that on the second survey they discovered eight timbers so much rat-eaten as not to hold the nails to replace the planks; but that from their general state they were not so defective, except from being eaten by rats, as to render her unfit for sea; that he was of opinion the leak was caused by the rats, and not from any rottenness; that the rats could not have gnawed to the degree found after the vessel left the cape, or in less than three or four weeks, and from the appearance of the holes and nests the rats must have been there longer than that time; that she was not seaworthy at the time of the second survey, nor when she left the cape; that it would have cost two thousand dollars to make the repairs at the cape.

From other testimony it appeared that the vessel was afterwards seen at Havanna, when her bottom was sound, though the sheathing was worm-eaten; that she there received no other repairs than a new sheathing, which cost four hundred and fifty dollars, and then took a cargo of molasses in safety to Philadelphia.

The defendant's counsel rested their case, these points having been raised. The vessel was proved not to have been seaworthy at the time of sailing from Cape François, at which time the warranty of seaworthiness applied; or that the unseaworthiness at that time being proved, the assured must show her seaworthy when the risk commenced; 2. That the survey and condemna-

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tion were a bar under the special memorandum; 3. That the eating by the rats was not a peril within the policy.

The chief justice charged the jury; 1. That the insurance commenced as soon as the vessel had been safely moored twenty-four hours at Cape François; and that the implied warranty of seaworthiness must be referred to the same time. If between the commencement of the insurance and the sailing of the vessel she became unfit for sea without the fault of the plaintiff, and was afterward lost by the perils of the sea, the plaintiff was entitled to recover; 2. With regard to the construction of the policy, unless the survey showed that she was unsound or rotten he did not think the plaintiff was barred of recovery by force of the policy only. As for instance, a vessel might be so disabled as not to be worth repairing in consequence of sudden accidents, such as loss of masts, breaking of her timbers by accident, without any decay of the wood. As to unsoundness by decay, it might be very reasonable to agree that the survey should be sufficient evidence of the state of the vessel at the commencement of the risk, but such agreement would be very absurd if applied to injuries arising from sudden accidents and the like. If the survey should say she was unsound and no more, the plaintiff would be barred. But if the whole survey taken together showed a defect arising from an accident, and not from decay, he thought the case would be different, and that the plaintiff would not be barred. Upon the last point, supposing the leak to have been occasioned by the eating of rats, he was of opinion that it was a risk within the policy.

The jury found for the plaintiff, seven hundred and twenty-one dollars damages.

Burd and Levy, on behalf of the defendant moved for an order to show cause why a new trial should not be granted on the ground of misdirection to the jury, and that the verdict was against evidence. In support of the motion they contended that the implied warranty of seaworthiness was coeval not with the risk but with the time of sailing, as it was then that it was material the warranty should be true. The agreement is that everything is in the condition in which it ought to be, *Park*, 220, and of course when it ought to be. Lord Kenyon held that under the words "at and from" in a policy it is sufficient if the vessel be seaworthy at the time of sailing, *Forbes v. Wilson*, *Park* 229; and if sufficient, it must also be material. So also per Lord Mansfield: *Eden v. Parkinson*, *Doug.* 708; *Schoolbred v. Nutt*,

Park, 229 a. The jury were wrong, moreover, as the facts raise a strong presumption that the vessel was not seaworthy at the time the risk commenced; and the proof of seaworthiness is on the plaintiff: Park 221; Marsh. 365; 2. The surveyors reported that the brig could not be repaired for her full value when repaired, which certainly proves unsoundness: 1 Valin. 657; 1 Emerig. 583; 3. Peril of the sea are such as human prudence cannot guard against: Park 61; Marsh. 416; and if through laches and negligence a loss arise it must fall on the party in fault, not on the insurer: Poth. on Ins. 66, sec. 64; 2 Valin. 79, art. 28. The eating by rats has been held chargeable to the captain's neglect: *Dale v. Hull*, 1 Wils. 281; Jones on Bail, 104; Abb. on Ship. 159; Marsh. 157; Emerig. 377.

Hallowell and Ingersoll, for the plaintiff. The risk commenced twenty-four hours after the vessel arrived at the cape, and the jury have found that she was then seaworthy. Counsel for defendant make no distinction between policies "at and from" and "from;" it is only in the latter that seaworthiness at the time of sailing has been held sufficient. The case of Mills frigate is decisive in our favor: Park 228; 2. The survey and condemnation did not proceed upon the rottenness and unsoundness of the vessel, and therefore the case is not within the memorandum; defendant must bring his case within the very words of the clause: *Watson v. Ins. Co. N. A.* 2 W. O. C. 152; 3. A leak is a peril insured against, and that it was caused by rats does not alter the case, as the liability of vessels to their depredation is well known, and the prevention of their entry into them impossible.

By Court, TILGHMAN, C. J. In this cause, as in many others, we feel the loss of our brother Smith. As the cause was tried before me, it was not my intention to give any opinion, but in case of necessity. It has now become necessary. I shall only say, however, on the points of law, that I have found no reason to alter the opinion delivered on the trial; and in that opinion Judge Brackenridge concurs with me. The law being settled, the merits of the case rest on the facts, whether the vessel was in proper condition at the time the injury from the rats took place, and whether the injury took place before or after the commencement of the risk insured against, and without the neglect of the captain. To these points the parties gave very little evidence on the trial; nor did their attention seem to have been turned toward them. All the proof made by the plaintiff

was that the vessel performed her outward voyage in good time; but as to her condition, or the condition of her cargo, there was no evidence. It appears that there are several more actions depending on the same policy; and, now that it is understood on what points the cause turns, it may be expected that the merits will be more fully investigated. The court are of opinion that it will be most conducive to justice to hold the present case under advisement till a trial is had in one of the other actions. If the jury find again for the plaintiff, there will be no reason for a new trial in this case; but, if a verdict shall be given for the defendant, it will be proper to grant a new trial, unless the parties themselves agree on some other arrangement.

YEATES, J., being related to one of the parties, took no part in the cause, but expressed himself as satisfied with the opinion of the court.

COMMONWEALTH v. DUANE.

[1 BINNEY, 601.]

CRIMINAL PROSECUTION BARRED BY STATUTE.—Where a statute directed “that from and after the passing of the act no person shall be subject to prosecution by indictment” for an offense therein mentioned; it was held that this was a bar to a prosecution for that offense, commenced and prosecuted to conviction before the passing of the statute, but in which no judgment had been pronounced.

INDICTMENT for libel of the late governor, McKean, in his official capacity. The defendant was convicted at *nisi prius*, before Yeates, J., and his counsel moved, in arrest of judgment, that the indictment did not charge the libel to be false. A second argument on this question was directed, it being understood that the court was divided in opinion; but upon calling the case it was suggested that a recent act of assembly had put an end to the prosecution, and the court, thereupon, ordered an argument upon this point before the merits should be discussed.

The act referred to is entitled “An Act concerning libels,” and was passed March 16, 1809. It is as follows:

Sec. 1. Be it enacted, etc., that from and after the passing of this act no person shall be subject to prosecution by indictment, in any of the courts of the commonwealth, for the publication of papers examining the proceedings of the legislature or any branch of government, or for investigating the official conduct of officers or men in a public capacity.

Sec. 2. That in all actions or criminal prosecutions of a libel the defendant may plead the truth thereof in justification, or give the same in evidence; and if any prosecution by indictment, or any action be instituted against any person or persons contrary to the true intent and meaning of this act, the defendant or defendants in such action for indictment may plead this act in bar, or give the same in evidence on the plea of not guilty. Provided, that this act shall be and continue in force for the term of three years, and from thence to the end of the next session of the legislature.

Rush and Hopkinson, for the defendant, contended that the act terminated all prosecutions heretofore commenced for libels upon men in their official capacity. The government alone is interested in criminal prosecutions, and it may put an end to them at any stage of the proceedings. The word prosecution in the act relates to the whole series of proceedings, from the commencement of the suit to sentence. Judgment is a stage of the prosecution future to us; the word *shall* protects the defendant. The law, moreover, has repealed the offense for publishing libels against officers as such, and when a statute creating an offense is repealed all proceedings under it fall: 1 H. H. P. C. 238, 291; 1 Hawk. P. C. b. 1, c. 40, sec. 10; *United States v. Passmore*, 4 Dall. 373. No one can be punished under the statute unless there is a saving clause: *Miller's case*, 1 W. Bl. 451; U. S. Laws, 204. If the first section puts an end to the prosecution nothing in the second should sustain it, for the whole act must stand. The question is: Is the defendant subject to a prosecution by indictment? Does it hang over him? If it does the law is violated.

Levy and Ingersoll, for the commonwealth, urged that this act was unconstitutional, that it was opposed to the first and seventh sections of the ninth article of the constitution, which were intended, the one as a security to reputation, the other as a regulation of the means for its protection. To the argument that the act is retrospective, the case of *Calder v. Bull*, 3 Dall. 397, may be replied, where it was said that if it is possible so to construe a law as to prevent this effect it is the duty of courts to do it. The first section does not repeal the offense; it merely provides a rule for the future. The second section is confined to prosecutions instituted contrary to the true intent and meaning of the act; and how can a prosecution be instituted against the spirit of the act unless it be commenced afterward?

TILGHMAN, C. J. This is an indictment for a libel against the late governor, McKean, in his official capacity. The defendant was convicted, and moved in arrest of judgment. In this situation, the act concerning libels was passed; the object of which is to take away the prosecution by indictment in cases of this nature. The question now to be decided is, whether the court can proceed to give judgment on the indictment. The counsel for the commonwealth have raised an objection to this law, on the ground of its being a violation of the ninth article of the constitution. Although their argument was rather faintly urged, it is proper to take notice of it. By the first section of the ninth article it is declared that all men have a right of acquiring, possessing and protecting property and reputation; and it is supposed that the protection of reputation will be less perfect when the punishment of libels by indictment is taken away. It may be so; and I fear it will be so. But it is sufficient to remark that the civil remedy by action is still left unimpaired; and that the proceeding by indictment is not the right of the injured party, but of the public. The seventh section of the same article provides that, in prosecutions for the publication of papers investigating the official conduct of officers, or men in a public capacity, the truth may be given in evidence. This, say the counsel for the commonwealth, shows that it was understood that there should be no prosecutions by indictment. I think it only shows that, at the time of the framing of the constitution, such prosecutions were lawful, and there was no reason to suppose that it might not continue to be lawful; but there is no ground for drawing an inference that the constitution intended to provide for the continuance of such prosecutions forever. It was intended to protect the defendant by permitting him, when prosecuted, to give the truth in evidence; but there is no intimation that it should be unlawful for the legislature to take away the prosecution altogether.

I will now consider the act of assembly. The first section enacts that "from and after the passing of the act, no person shall be subject to prosecution by indictment in any of the courts of this commonwealth for the publication of papers investigating the official conduct of officers, or men in a public capacity." The prosecution by indictment is the only criminal prosecution of such offenses known to our law; because the proceeding by information is forbidden by our constitution. When, therefore, it is said that a man shall not be subject to prosecution by indictment, it is saying that he shall not be, sub-

ject to any criminal prosecution. Now what is a prosecution? It is the whole proceeding, including the judgment. In the case before us, the judgment, the most material part of the prosecution, remains to be given. Can the court pronounce judgment and inflict punishment when the law declares that the defendant shall not be subject to prosecution? I do not see how they can.

But it is contended by the counsel for the prosecution, that although it might be improper to pronounce judgment, if the matter rested on the first section of the law; yet taking into consideration the second section, it will appear on the whole, that there was no intent to give relief in case of prosecutions commenced before the passing of the law. It is necessary, therefore, to examine the second section; for it is true, that in construing any part of a law the whole must be considered; the different parts reflect light on each other; and if possible, such a construction is to be made as will avoid any contradiction or inconsistency. That part of the section which is material to the present purpose, declares, that "if any prosecution by indictment be instituted against any person, contrary to the true intent and meaning of this act, the defendant in such indictment may plead this act in bar, or give the same in evidence on the plea of not guilty." It appears then, that the first section declares the law, and the second section provides the mode by which, in certain cases, the defendant shall avail himself of that law. The mode of thus availing himself, is confined to indictments which have not been tried; and I incline to think, although I give no decided opinion, that it is confined to prosecutions commenced after the passing of the law. For, without entering into a critical examination of the meaning of the word institute, in common parlance, when applied to legal proceedings, it signifies the commencement of the proceeding. When we talk of instituting an action, we understand bringing an action. Supposing then, that this is the meaning of the word, which is giving the greatest possible weight to the argument for the commonwealth, how will the matter stand? It will hardly be contended that the affirmative words in the second section, confine the defendant to the mode of defense pointed out in that section, if the first section entitles him to other modes of defense. For instance, if a prosecution is commenced after the passing of the law, for a matter which on the face of the indictment is a libel against a man in his official capacity, the defendant may surely take advantage of this act, by motion

in arrest of judgment, although he neither pleaded it in bar, nor gave it in evidence on the plea of not guilty. I conclude, therefore, that there is no contradiction or inconsistency in giving to the second section the construction contended for the commonwealth; and at the same time allowing the first section to operate in its full extent. If the legislature intended that the proceedings should be continued on indictments already commenced, they ought to have said so expressly. This law is not drawn as clearly as it might have been. If the same expressions had been used, as applied to a civil action, I should have thought myself warranted in giving it a different construction, because then it would have operated in a retrospective manner, so as to take away from a citizen a vested right. But there is a wide difference between a civil and a criminal action. In the latter, the commonwealth only relinquishes its own right of inflicting punishment. In nothing is the common law, which we have inherited from our ancestors, more conspicuous, than in its mild and merciful intendments, toward those who are the objects of punishment. We apply the principles of this law to the construction of statutes. Supposing, therefore, as is certainly the case, that this act is not without obscurity, I feel myself on the safest and the strongest ground, in adopting that construction which takes away the punishment.

My opinion is that the judgment be reversed.

YEATES, and BRACKENRIDGE, JJ. concurred.

Judgment arrested.

This case is cited by Mr. Justice Miller in *Steamship Co. v. Jekiffe*, 2 Wall 465, as to the effect of a repealing statute.

CASES
IN THE
GENERAL COURT AND COURT OF APPEALS
OF
MARYLAND.

GITTINGS' LESSEE v. HALL.

[1 HARRIS & JOHNSON, 14.]

PARTIAL POSSESSION OF LAND CONVEYED.—A party being in possession of a part of a tract of land, under a deed conveying to him the whole tract, may grant the whole by a deed of bargain and sale, without entering on that part of which he is not in possession, notwithstanding an adverse possession of the said part by enclosure.

DEED INADMISSIBLE IN EVIDENCE.—A record copy of a deed which is not required to be enrolled, cannot in general be received in evidence; but if possession has been held under it for upwards of thirty-nine or forty years, a certified copy may be given in evidence.

DEFECTIVE ACKNOWLEDGMENT.—A conveyance of land acknowledged by the grantor and his wife, before two justices of the peace, in a county in which they did not reside, and in which the land was not situated, is not admissible in evidence; but parol evidence may be received to prove that a grantor, although stated in the deed to reside in a particular county, was a resident of the county in which the deed was acknowledged.

PAROL EVIDENCE INADMISSIBLE AGAINST SURVEY.—The defendant cannot prove on his trial that the locations made on the plats in the cause, were not in compliance with his instructions to the surveyor.

JUDGMENT VOID FOR UNCERTAINTY.—Where the plaintiff in ejectment locates his claim on the plats in two ways, and there is a general verdict and judgment rendered thereon, such judgment is void for uncertainty.

EJECTMENT for part of a tract of land called Hill's Forest, in Baltimore county. Defense on warrants and plats returned.
1. The defendant claiming through one Walter Tolly, offered evidence to prove that Tolly was in the actual possession, by inclosure, of the land included within the fence located on the plats, and claiming it as his own, at the time that James Bosley

executed the deed to George Buchanan, of the sixteenth of June, 1784, for part of Hill's Forest, containing four hundred and thirty-one acres, more or less, it being the tract or parcel of land conveyed by Ogle and wife, to the said Posley, and that the latter in laying of the land to Buchanan, laid the same down by actual survey with the said fence, excluding the possession of the said Tolly. The latter, and the defendant claiming through him, continued the possession by actual inclosure, during the whole time that Buchanan claimed the land called Hill's Forest, for which the action is brought, and at the time the said Buchanan made the deed to the lessor of the plaintiff (twenty-eighth of December, 1780), and this possession was continued to the time of bringing the present action.

On this the defendant asked the opinion of the court, and instruction to the jury, that if the facts stated were found to be true, that then the said deeds, viz: that from Bosley to Buchanan, and Buchanan to the lessor of the plaintiff, cannot operate to convey any title to the land inclosed, possessed, and claimed by the defendant.

CHASE, C. J., DUVALL and DONE, JJ., concurring. The court are of opinion that as James Bosley was in possession of part of the land conveyed to him by Benjamin Ogle and wife, and George Buchanan was in possession of the same land conveyed by James Bosley to George Buchanan, it was not necessary for George Buchanan to enter on that part of the land contained within the inclosure of Walter Tolly, described above, at the time of making the said deed of bargain and sale from George Buchanan to the lessor of the plaintiff, in order to give it validity, and make it operate as such; and that Bosley's laying down the same land by actual survey with the fence, excluding the possession of the said Tolly, cannot affect or control the operation of the said deeds, or affect their validity to pass the same land. The court refuse to give the direction to the jury, as prayed by the counsel for the defendant. The defendant excepted.

2. The plaintiff offered to read in evidence, to show title to the land described in his declaration, a certified copy of a deed from Henry Hill to Joseph Hill, in the following words:

“ To all Christian people to whom these presents shall come. Henry Hill, of Anne Arundel county, in the province of Maryland, sendeth greeting, etc. Know ye that I, the said Henry Hill, as well for and in consideration of the natural love and affection which I have and do bear unto my well-beloved son, Joseph Hill, of the county and province aforesaid, as also for

divers other good causes and consideration me thereunto moving, have given, granted, made over and confirmed, and by these presents do give, grant and make over and confirm unto my said son, Joseph Hill, his heirs and assigns forever, the several tracts or parcels of land following: that is to say, one tract or parcel of land situate, lying and being in the fork of Gunpowder river, in Baltimore county, called and known by the name of Hill's Forest, and containing a thousand acres more or less; two other tracts or parcels of land situate, lying and being on the north side of Little Choptank river, in Dorchester county, the one called Tench's Hope containing two hundred acres; the other, called Ragged Point, containing four hundred and forty acres, or thereabouts, be the same more or less. To have and to hold the said several parcels of land, called Hill's Forest, Tench's Hope and Ragged Point, with, all and singular, the premises, rights, profits, advantages, emoluments and appurtenances to the same belonging, or in anywise appertaining, unto him the said Joseph Hill, his heirs and assigns forever, to his and their only proper use and behoof forevermore; together with the full, free, quiet and absolute possession of the same to all ends and purposes whatsoever. In witness whereof, I have hereunto set my hand and affixed my seal, this twenty-seventh day of July, seventeen hundred and thirty-seven. Henry Hill. [L. s.] Signed, sealed and delivered in the presence of John Brice, George Stewart, Robert Gordon."

On the back was an acknowledgment before one of his lordship's justices, and also a receipt for the alienation fine for the use of Lord Baltimore. The copy was duly certified by the clerk for the general court of the western shore.

The defendant's counsel objected to the admission of this certified copy in evidence to the jury.

CHASE, C. J. The court are of opinion that the copy of the deed from Henry Hill to Joseph Hill cannot be received in evidence, it not appearing by the copy to have the words, "This indenture," and no money consideration being expressed in the deed; and therefore not a deed of bargain and sale. The court are to decide, on inspection, whether or not the deed was indented; and the original deed must be produced, that the court may determine whether or not the deed was indented. The court are also of opinion that a copy from the record of a deed which does not require enrollment cannot be received in evidence, but that the deed itself must be produced, as the best evidence. If the original deed is lost, destroyed or in posses-

sion of the adverse party, which must be proved to the court, a copy is admissible in evidence, if proved to be a true copy by a person who has compared it with the original; and a copy from the record may be received in evidence if possession has gone accordingly for upwards of thirty-nine or forty years.

The plaintiff then offered in evidence the entry on the old rent rolls as to the possession and as to the time when a deed had been executed from Henry Hill to Joseph Hill in the following words: "One thousand acres, two pounds yly. rent, Hill's Forest, sur. 4, Sept. 1683, for Ri. Hill, above ye head of Gunpowder river, on the So. side ye Nor. branch of ye said river at a bounded red oak, and now belonging to Joseph Hill. One thousand, Joseph Hill from Henry Hill, twenty-seventh of July, 1737. True copy from the old rent roll of Baltimore county, page 424. Jno. Callahan."

He also offered Henry Hill's will, dated tenth of February, 1738-9, in which he particularly devised his real estate but made no mention of Hill's Forest, and there was no residuary devise; also the charge of Hill's Forest on the debt books of the province, showing a charge to Joseph Hill; also Joseph Hill's will, dated twentieth of October, 1761, devising two hundred acres, part of Hill's Forest, to Joseph Richardson, another part to Daniel Richardson, and the residue to Henry Margaret Hill, then Henry Margaret Ogle, his grand-daughter and heir at law; also the charge in the said debt books in 1762, of Hill's Forest to Joseph Hill's heirs; also a charge in 1771 in the debt books to the aforementioned parties.

He next offered the regular conveyances to the present possessors of Hill's Forest from Joseph Hill through his three devisees named, viz.: a deed stated to be dated the twenty-fifth of June, 1777, and made by and between "Benjamin Ogle, Esq., and Henry Margaret, his wife, of Anne Arundel county, in the state of Maryland, of the one part, and James Bosley, of Charles of etc.," of the other part, for part of a tract of land called Hill's Forest lying in Baltimore county, containing four hundred and thirty-one acres; which deed was acknowledged by the grantors before two justices of the peace for Prince George's county; and the said deed was recorded in Baltimore county on the twentieth of September, 1777; and a deed from the said James Bosley, of Charles, to George Buchanan for the same land, dated the sixteenth of June, 1784; and a deed from Joseph Richardson, of Dorchester county, to Charles Wells, dated the twenty-seventh of March, 1779, for two acres, part of the said

tract, devised to the said Joseph Richardson. This deed was acknowledged and recorded in Baltimore county on the thirty-first of July, 1779; and a deed from Charles Wells to George Buchanan, dated the ninth of October, 1784, for two hundred acres, the same conveyed by Richardson to Wells; and a deed from George Buchanan to James Gittings, dated the twenty-eighth of December, 1789, for the last mentioned part of the tract called Hill's Forest.

The plaintiff also offered evidence showing that there was actual possession of Hill's Forest, by living on the same under the title of Joseph Hill, ever since the year 1772; also evidence that whilst it lay out in the woods unoccupied it was reputed to belong to a person of the name of Ogle; also evidence of one Thomas, aged fifty-six and upward, a person connected and well acquainted with the Hill family, showing that in the said family Hill's Forest was always reputed to belong to the said Joseph Hill and those claiming under him, and that he never heard that any other of the family laid claim to the same; that Henry Hill, son of Doctor Richard Hill, who was a brother of Joseph Hill, and heir at law of Henry Hill, father of the said Richard and Joseph, was frequently in the state from the year 1761 to the year 1792; that about the year 1769, 1770, or 1771, the said Henry Hill, junior, spent the most of two years at the house of the said Thomas with Mrs. Ogle above named, the reputed owner of Hill's Forest; that Dr. Richard Hill, father of Henry, junior, and son of Henry, senior, was born in the state, and came to the state in 1752 from the island of Madeira where he then resided, remained here among his relatives in and about the city of Annapolis about a year; that the executors of the said Joseph Hill and the said Thomas as guardian of Mrs. Ogle, paid the quit rents on Hill's Forest from the death of Joseph Hill until the marriage of Mrs. Ogle; also that no person has held any part of Hill's Forest, claiming as such, except those holding under the said Joseph Hill.

There was no evidence that Richard Hill, the heir at law of his father, Henry Hill, or that Henry Hill, the heir at law of Richard Hill, or any other person, ever claimed a right to Hill's Forest, or any part thereof, except the said Joseph Hill, and those claiming under him; and no title was now set up by the defendant under the heirs of Henry Hill, father of the said Joseph Hill.

The defendant's counsel offered in evidence that the tract of land called Hill's Forest, for which suit is brought, was granted

to Richard Hill on the tenth August, 1684, and that the said Richard Hill left issue three sons, Richard, Joseph and Henry; that he made his last will and testament on the twentieth October, 1700, and therein devised the land in fee to his three sons as tenants in common; that the said Henry survived his brothers, and became sole seised in fee as heir to the grantee; that the said Henry had issue two sons, Richard, the eldest, and Joseph; that Richard removed to the island of Madeira and resided there many years, and that he was there alive in the year 1750, and afterward died there, leaving Henry Hill, of Philadelphia, his son and heir at law, and who died without children in the year 1798, leaving a large fortune, and that his heirs are sisters and children of deceased sisters. The defendant offered in evidence the afore-mentioned entry on the rent rolls, introduced by plaintiff, in which reference is made to the date of the certified copy of the deed, and in order to account for such entry being made on the said rent roll. He further offered in evidence that no actual possession or occupation of the land, nor any part thereof, ever was at any time in any person claiming under Joseph Hill, from whom the lessor of the plaintiff seeks to derive title; but that the whole of the said land was in woods and unoccupied until the year 1772, when James Bosley, under whom the lessor of the plaintiff claims, entered into a part thereof; and that the said Joseph Hill, nor any person claiming under him, never made an entry on, nor had the actual possession of any part of the land for which the defendant claims, according to the plats returned.

The plaintiff's counsel prayed the opinion of the court and direction to the jury, that from the whole of the evidence above stated on the part of the plaintiff, they may and ought to presume that a deed good and operative in law to convey the said land called Hill's Forest, was executed and did pass the said land in fee from the said Henry Hill, the son of the original patentee, to his son Joseph Hill.

CHASE, C. J. The court are of opinion and so direct the jury, in case they find the several facts stated by the plaintiff to be true, although they should find the several facts stated by the defendant to be true; that the same facts so stated by the plaintiff are sufficient for the jury to presume, and they ought to presume, that the said Henry Hill did make and execute a good and sufficient deed, valid and operative in law, to transfer and pass the said land called Hill's Forest from the said Henry

Hill to the said Joseph Hill and his heirs. The defendant excepted.

3. The plaintiff's counsel offered to read in evidence a location of a tract of land called Holland's Park, on the plats returned in the cause, as an act of the defendant, evidencing the true location and position of the said tract called Holland's Park. The defendant, to show that the said location was not his act, offered to give in evidence to the jury his original instructions, in writing, to the surveyor as to the laying down the said land, and he offered to prove by the surveyor that the location made and returned on the said plats were made by a misapprehension of said instructions, and contrary to them.

CHASE, C. J. The court are of opinion that the testimony offered on the part of the defendant is improper and cannot be received; and the court refuse to let the said evidence so offered go before the jury. The defendant excepted.

A verdict was given for the plaintiff. The defendant brought a writ of error, and the record of the proceedings was removed to the court of appeals, where, at the November term, 1802, the cause came on, and was argued by *Key, Harper and Johnson*, for appellant.

Martin, attorney-general, and Shoaff, for respondent.

By COURT, MACKALL, JONES, POTTS, and DENNIS, JJ. The first bill of exceptions in this cause presents two questions for decision: 1. If James Bosley, who is stated to have been in the possession of the land called Hill's Forest, at the execution of his deed to George Buchanan, and George Buchanan having the same possession of the land conveyed by James Bosley to him, had, in construction of law, at the execution of their several deeds, such a possession of the whole as entitled them to convey the same by deed of bargain and sale, notwithstanding the possession of Walter Tolly, by inclosures during those periods, as stated in the same bill of exceptions? and, 2. If, under such circumstances, the deeds of bargain and sale by them could operate to convey the whole of the tract to which they were entitled, whether the operation of those deeds or either of them could be restricted or controlled by any evidence appearing in the record extrinsic of the deeds?

Upon these questions this court concur with the general court, and affirm the judgment expressed in that bill of exceptions.

The second bill of exceptions offers this question: Whether the evidence given on the part of the plaintiff below presented such a ground as justified the direction of the court to the jury, that they might and ought to presume that a deed, good and operative in law, to convey the said land called Hill's Forest, was executed, and did pass the said land in fee from the said Henry Hill, the son of the original patentee, to Joseph Hill, his son, although they should find the several facts stated by the defendant to be true?

Upon advertng to the record, it appears to this court that a part of the evidence offered to the jury to prove the statement on which they were to ground the presumption of a good and operative deed from the said Henry Hill to Joseph Hill, was not admissible by law to be read to the jury, to wit: the deed from Benjamin Ogle and Henry Margaret, his wife, to James Bosley, inasmuch as the same deed purports to have been executed by Benjamin Ogle and wife, of Anne Arundel county, and is acknowledged before two justices of the peace of Prince George's county, and from thence certified and transmitted to and recorded in Baltimore county, where the land lies.

It was competent to James Gitting's lessee, at the trial, to have proved to the jury that Benjamin Ogle and his wife, although stated in the deed to be of Anne Arundel county, were residents of Prince George's county, if that had been the fact. Having omitted to do that, and that fact making no part of the case stated in the bill of exceptions, the court cannot go out of the record for evidence of the fact, or in any manner supply the omission. The court are therefore of opinion that the direction given was erroneous, because it appears that inadmissible evidence was read to the jury to support an important part of the statement on which they were to ground the presumption of a deed from Henry Hill to Joseph Hill, which part of the statement, if struck out, does not leave such a case as will justify the judgment given in favor of the plaintiff in ejectment. The court therefore disagree with the general court in the direction stated in the second bill of exceptions to have been given, and reverse the judgment of the general court on that bill of exceptions.

In the record another objection presents itself to the judgment rendered in the general court. The uncertainty of the verdict found; that verdict not ascertaining, with sufficient precision, the location of the plaintiff's claim, and the particular land for which the jury find for the plaintiff. The plaintiff hath

made two locations of his pretensions; the jury do not say which of those locations they find to be the true location of the land; both of them cannot be right. The judgment of the court does not ascertain it, and this court can see nothing in the record to direct the general court, or this court, in giving their judgment that certainty required in judgments.

Much has been said respecting the exemplification of the deed from Henry Hill to Joseph Hill, in 1737, offered in evidence by the plaintiff in ejectment, at the trial in the general court. That exemplification having been rejected by the general court, and that rejection acquiesced in by the plaintiff there, it makes no part of the record before this court, and can only be considered as an abstract proposition, not in the cause at all, and on which this court can judicially give no opinion.

As to the third bill of exceptions, this court concur with the general court, and affirm their judgment on that bill of exceptions.

Judgment of the general court reversed.

This case is cited with approval in *Cresap v. Hutson*, 9 Gill, 273, and in *Hoye v. Swan*, 5 Md. 251, decided in 1853. This last is a well considered case on ejectment, and is worth examination. Several points were determined. Thus, exclusive and unmixed possession for more than twenty years by a wrong-doer, without actual inclosure, is not a bar to an ejectment by the legal owner, though the latter may never have been in actual possession of any part of the land. Where a party *bona fide* enters and claims under title, he acquires in law actual possession to the extent of the boundaries contained in his title, whether it be valid or not, but the possession of a wrong-doer does not extend beyond actual inclosure. As against a wrong-doer claiming title by possession alone, the law in this state is the same, whether the real owner be in actual possession of any part of the land or not. Where one has such possession of lands as is insufficient to give title by adverse possession, and another succeeds him, holding the land in the same manner, the imperfect possession of the former, when united to that of the latter, cannot make it adverse, continuous and exclusive as against the real owner. The case is cited in *Donahue v. M'Nulty*, 24 Cal. 417, on the point that parol evidence is not admissible to prove that a deed professing to convey all, was intended to convey a part only, and in *Longworth v. Close*, 1 McLean, 285, that a deed must be produced in evidence unless it was lost.

McDONOUGH v. TEMPLEMAN.

[1 HARRIS & JOHNSON, 156.]

CONTRACT BY AGENT. Where the agent of a corporate body, entered into a contract in his own name, under seal with another person, but in the body of the contract, it was stated, that the agent contracted in behalf of the corporation; it was held that the agent was not personally liable.

Action of covenant. The declaration stated, that by articles of agreement made between one Edward Burrows, of the city of Washington, for and on behalf of the said McDonough, of the one part, and the said Templeman, in behalf of the Georgetown Bridge Company, of the other part, "It was agreed this tenth day of January, 1797, between Edward Burrows of the city of Washington, in behalf of Maurice James McDonough, of Charles county, of the one part, and John Templeman, in behalf of the Georgetown Bridge Company, of the other part, that the said Edward Burrows doth hire unto the said John Templeman, for the use of the said Bridge Company, seven slaves, named as follows, to wit: Jem, etc., belonging to the said McDonough, from the date hereof until the twenty-fifth December next ensuing; and the said John Templeman doth agree to pay for each of the said slaves, from the date hereof until the said twenty-fifth December next ensuing, sixty dollars, together with giving them sufficient board, lodging, clothing and necessary medicine, and other attendance during sickness. The said John Templeman doth further agree to send off the said slaves at the expiration of the said term, in good clothing, and to allow Bob two and a half days four times in the year, to go to see his wife, the said sum of four hundred and twenty dollars to be paid by the said John Templeman unto the said Maurice James McDonough, or his order, on the said twenty-fifth December next, without any deduction for board or other articles, or for lost time, etc. In witness whereof the said parties have hereunto set their hands, and affixed their seals, the day and year first above written. Edwd. Burrows, [seal]. John Templeman, [seal]. Signed, sealed and delivered in presence of Walter Smith."

The averment was that the slaves were delivered, and that the sum of four hundred and twenty dollars was due and unpaid. There was a general demurrer to the declaration and joinder thereon.

The general court overruled the demurrer, and gave judgment for the plaintiff. The defendant took the proceedings by writ of error to the court of appeals.

Mason, for the plaintiff in error, contended that it was a contract with the Georgetown Bridge Company, and that Templeman was not answerable, individually. A corporation cannot act except by an agent, and if he is to be held responsible in his private capacity, it would be difficult to get a person to act for a corporation. The contract on its face appears in effect to

be a contract between two absent parties. The supreme court of the United States decided that an action would not lie against a foreign consul, on a bill of exchange drawn by him in his official character, on his government. *Jones v. Le Tombe*, 3 Dall. 384. So in the case of *Macbeath v. Haldimand*, 1 T. R. 172, a government officer, treating as an agent for his government, was adjudged not to be personally answerable upon contracts made by him in his capacity as agent. (See the case of *Brown v. Austin*, ante, 11, for a similar principle.) In the case of *Thomas v. Bishop*, 2 Str. 955, the plaintiff sued as indorsee of a bill. The defendant (cashier of the York Building Company), had accepted the bill generally, and not as agent of the company. If the bill had been accepted to be paid out of the York building fund, the company only would have been responsible. The defendant was held liable by reason of his having accepted the bill generally. These cases are all on simple contracts, but this makes no difference. In *Unwin v. Wolseley*, 1 T. R. 674, it was adjudged that a servant of the crown, contracting by deed on account of government, was not personally liable; and it did not matter whether it was by deed or parol. To the same point is the case of *Hodgson v. Dexter*, 1 Cranch. 845.

Buchanan, for the defendant in error, stated two exceptions were taken to the judgment by the other side: 1. That Templeman is not personally responsible; and, 2. That McDonough is not a proper party to the suit.

1. This being a corporation aggregate, the company may act by its directors, or it may contract by agent; but it does not appear that Templeman was its agent, or had authority to act. Though he describes himself as agent, he expressly stipulates that he will pay the money for the hire of the slaves, and he has not signed the contract as agent.

There is not that close analogy between a government and a corporate body, as the opposite counsel claims. The case of *Jones v. Le Tombe* does not differ from *Macbeath v. Haldimand*. The bill in the former was expressly drawn on the treasurer of the French government. The indorsement was on the faith of the government, and there was nothing there to create a personal responsibility. In *Macbeath v. Haldimand*, Ashurst, J., said that a person contracting in the capacity of an agent, may make himself personally liable, in which Buller, J., concurred. Haldimand was the governor of Quebec, and contracted throughout as the agent of his government. In the case of *Thomas v.*

Bishop, it appears that the acceptor intended to accept the bill as agent of the York Building Company, though it was not so expressed. The letter of advice was addressed to the company, and it appeared to be a transaction with them, but as the defendant did not accept the bill as agent, he was considered personally liable.

The case of *Hodgson v. Dexter* is perfectly consonant to *Macbeath v. Haldimand*. *Dexter* in the contract is described "as secretary of war," and the demise is to him and "his successor." It was as much a contract with the government as if it had been with John Adams, President of the United States. The contract cannot bind the company; for a corporation aggregate can make no contract except under its corporate seal, or by an agent acting under a power of attorney under the seal of the corporation: Com. Dig. tit. Franchise, 12, 13, 14; Harg. Co. Litt. 94, b.; Woodd. s. 493; 1 Bac. Ab. 507. It is laid in 1 P. Wms. 656, that a contract, to bind a corporation, must be under its corporate seal; and that the individual members who signed a corporation lease were personally responsible, because the lease was not under the seal of the corporation.

The COURT OF APPEALS, at June term, 1804, reversed the judgment of the general court, being of opinion that the plaintiff in error acted as the agent of the Georgetown Bridge Company, and did not by the contract make himself personally responsible.

This case was recognized as authority in *Key v. Parnham*, 6 Harr and J. 418, where it was held that if upon the face of the instrument one of the contracting parties appears plainly to be acting as the agent of another, the stipulations of the agreement operate solely to bind the principal, unless it manifestly appears that the agent intended to superadd or substitute his own responsibility for that of the principal. The subject on which the court decided in the principal case, is one of much significance in the execution of written contracts by agents; and it is therefore proposed to examine the cases on this point. Questions on this head may arise from four states of facts: 1. The agent may append to his signature, the character in which he signs the instrument, without any corresponding or other description of his relation in the body of the contract; 2. He may in the body of the instrument disclose the name of his principal, and sign his own name, without the addition of any descriptive terms whatever; 3. He may sign his own name without apt terms to charge himself, and in the body use doubtful expressions as to his representative character; and, 4. He may sign his own name with no descriptive addition, or make any allusion to his representative character in the body of the instrument.

1. ADDITION OF DESCRIPTIVE TITLE MERELY.—It is a well-established general rule that descriptive words denoting relation, appended to a signa-

ture to a contract, nothing besides appearing on the face of the instrument, are regarded as *descriptio personæ*, and will not prevent the contract being regarded as that of the person whose signature is subscribed: *Price v. Taylor*, 5 H. and N. 315; *Taft v. Brewster*, 9 Johns. 334; *Stone v. Wood*, 7 Cow. 453; *Summalt v. Ridgeley*, 20 Md. 114; *City of Detroit v. Jackson*, 1 Doug. 115.

We have stated the rule with the qualification that nothing besides appears on the face of the instrument, indicating an engagement on behalf of another person. It is agreed that the affixing of such words as "treasurer," "secretary," "agent," "cashier," and when the corresponding terms are given, will not make the obligation other than that of the person signing: *Sturtivant v. Hall*, 59 Me. 172; *Haverhill Ins. Co. v. Newhall*, 1 Allen, 130; *Fiske v. Eldridge*, 12 Gray, 474. The doctrine of the Massachusetts cases may be given as stated in *Barlow v. Congregational Society*, 8 Allen, 460, where it is said that "all the decisions of this court upon unsealed instruments, since the case of *Mann v. Chandler*, have required something more than a mere description of the general relation between the agent and the principal, in order to make them the contracts of the latter." And this is well established by a well-considered case in that state: *Tucker Mfg. Co. v. Fairbanks*, 98 Mass. 101. What must appear further than a mere signature in this manner, is illustrated in the case of *Carpenter v. Farnsworth*, 106 Mass. 561, S. C. 8 Am. R. 360. There a bank check having the words "Ætna Mills" printed in the margin, and signed "A. B., treasurer," was held an obligation of the Ætna Mills, and not of A. B. And a similar case is *Bank of Genesee v. Patchin Bank*, 19 N. Y. 312, where the cases are well reviewed.

But much conflict of authority exists in regard to the legal signification where the signature is in this manner: "For A. B. by C. D." Some of the cases hold that this more strongly imports a signature and an obligation on behalf of another, and will exempt the party signing from personal liability. The cases holding this most strongly are: *Long v. Coburn*, 11 Mass. 97; *Rice v. Gove*, 22 Pick. 158; *Ballou v. Talbot*, 16 Mass. 461; *Emerson v. Prov. Hat. Co.*, 12 Id. 237; *Alexander v. Sizer*, L. R. 4 Exch. 102. In the last case the signature to a promissory note was: "For Mistle, etc., Co. John Sizer, Secretary," and it was held that the secretary was not personally liable. Referring to this view, Gray, J., in *Tucker Mfg. Co. v. Fairbanks*, *supra*, says: "The authority which at first sight seems most strongly to support the defendants is that of *Ballou v. Talbot*, in which a note signed "Joseph Talbot, agent for David Perry," was held not to bind Talbot personally. That case has since been recognized in this commonwealth: *Jefts v. York*, 4 Cush. 372; *Page v. Wight*, 14 Allen, 182. But the important and effective word in *Ballou v. Talbot*, was not the word "agent," nor the name of the principal, but the connecting word "for," which might indeed indicate merely the relation which the agent held to the principal; but which was equally apt to express the fact that the act was done in behalf of the principal in the same manner as if the words had been transposed thus, "For David Perry, Joseph Talbot, agent:" See *Deslandes v. Gregory*, 2 El. & El. 602. This is made manifest by considering that if the word "agent" had been wholly omitted, and the form of the signature had been simply "Joseph Talbot, for David Perry," or "for David Perry, Joseph Talbot," it would have been well executed as the contract of the principal, even if it had been under seal, and of course not less so in the case of simple contract." To this view are opposed several well considered cases, such as *De Witt v. Walton*, 9 N. Y. 571; *Tannatt v. Rocky M. Bank*, 1 Col. 278; S. C.

9 Am. R. 156; *Offutt v. Ayres*, 7 Monr. 356; *Garrison v. Combs*, 7 J. J. Marsh, 84. In *De Witt v. Walton*, a promissory note was given in these words: "Four months after date I promise to pay to the order of W. H. B. Smith, three hundred and twenty-four fifty-nine one-hundredths dollars value received. David Hubbell Hoyt, agent for the Churchman." It was held that such a note did not purport to be the note of "The Churchman" but of H.; and that the words "agent for the Churchman" were mere words of description. In *Tannatt v. Rocky M. Bank*, an agent signed a bill in this form, "T. R. T. agent for S. T." and there was nothing in the body of the bill evincing an intent to bind the principal. It was held that this was the bill of the agent and not of the principal, and that parol evidence was not admissible to show an intent to bind the principal.

Parsons on Notes and Bills, p. 97, makes the following statement regarding this subject: "If an agent of an incorporated company make a note beginning, 'I promise,' etc., and sign it 'A. B., agent of — company,' it is quite well settled that the company, not the agent, will be liable on the note. And the same rule applies *a fortiori* in the case of public officers or agents appointed to discharge public trusts. Whether a note made in the same form by the duly authorized agent of a private person would be the note of the principal or of the agent, is not so certain. We think, however, it would be the note of the principal. If such an agent give a note beginning, 'I promise,' etc., and signed 'A for B,' it has been decided in several cases that this is the note of the principal and not of the agent."

This is probably as nearly a correct statement of a general principle as can be made regarding the subject. An illustration in reference to an agent's signature on behalf of a corporation is the case of *Dubois v. Delaware, etc., Canal Co.*, 4 Wend. 285. There the contract was signed "Maurice Wurtz, agent for the Delaware and Hudson Canal Company," and signed with the seal of Wurtz. The consideration was given to the company. It was held that this was not the private contract of the agent, and it was binding on the company. Wharton on Agency, sec. 292, lays down a similar general rule thus: "Yet, when we scrutinize the cases of notes signed by officers of a corporation, these cases melt into each other by shades which it is not easy to discriminate. We may, however, generally say that a person who defines himself in a negotiable note or bill as treasurer or agent of a designated corporation, and signs the paper as such, binds not himself, but the corporation. But it is otherwise where the party signs simply as agent, or where there is no indication that the person signing acts on a principal's behalf."

In regard to the execution of sealed instruments, such as muniments of title, a stricter rule prevails. Here, the contract should be in the name of the principal, the covenants in his name, and executed by the agent expressly on his behalf: Wharton on Agency, sec. 283. Thus the following instrument was held invalid, so far as binding the alleged principal: "Know all men by these presents that the New England Silk Co., a corporation, by C. C., their treasurer, etc., do hereby grant, etc. * * * In witness whereof, I, the said C. C., in behalf of said company, and as their treasurer, do hereby set my hand and seal." *Brinley v. Mann*, 2 Cush. 337. To the same point are *Echols v. Chenery*, 28 Cal. 157; *Morrison v. Bowman*, 29 Id. 337; *Love v. Sierra Nevada etc. Co.*, 32 Id. 639. In the last the court say: "It is a rule of conveyancing long established, that deeds executed by an attorney or agent must be executed in the name of the constituent. It was so resolved in *Combe's case*, 9 Co. 76, and the rule was recognized and applied by us in *Echols v. Chenery*, 28 Cal. 157."

In *Echols v. Chenery*, A., the attorney of P., executed a deed in his own name, signing it opposite the seal, but adding the words, "attorney for P.;" it was ruled that neither under the Mexican or common law did any interest of P. in the granted premises pass by the deed.

2. WHERE AGENCY APPEARS ONLY IN BODY OF INSTRUMENT.—This was the manner in which the agency appeared in the principal case; where it was expressly held that when the agent undertook, in the body of the instrument, to contract on behalf of a party named, and, though he signed his own name simply with his private seal, it did not make him personally liable. *Hopkins v. Mehaffy*, 11 S. & R. 126, is a similar case where it was held that if in the body of a sealed instrument the covenants are stated as if they were made by a corporation directly with the plaintiff, without the agency of any one, and the defendant was not named, but signs the instrument and seals it with his own seal as president of the corporation, and on their behalf, an action cannot be sustained upon it against him individually. In this case the president signed simply "James Mehaffy. [Seal.]" And the authority of this case was recognized in *Abrams v. Musgrove*, 12 Pa. St. 295. If this has been held with regard to sealed instruments, *a fortiori* will the rule hold good that an execution of a simple contract in this manner, will not personally bind the agent.

3. WHERE THE NATURE OF THE UNDERTAKING IS UNCERTAIN; as where the party signing may append some descriptive term, and in the body use doubtful expressions as to his representative character. Cases like this occur where directors or trustees of a corporation enter into written contracts, and, in such instances, it is often doubtful what construction to place on the undertaking, and here the cases do not very well harmonize, and the decisions, it must be admitted, are somewhat arbitrary.

In *Aggs v. Nicholson*, 1 H. & N. 165, a promissory note was in this form: "We, two of the directors of the A. L. A. S. by and on behalf of the said society, do hereby promise to pay," etc. (Signed). Charles Nicholson, H. Wood. The court held the directors not to be personally liable. So in *Lindus v. Melrose*, 3 H. & N. 177, three directors of a joint stock company signed a note in this form: "Three months after date we jointly promise to pay, etc., on account of the L. & B. Company," and signed, affixing directors to their names. Coleridge, J., says: "Any one reading such a note and bringing to it the ordinary knowledge, which must be presupposed, would assuredly conclude that the note was made by the defendants as officers and not as individuals—they promise on account of the company—they sign as directors and their signature is countersigned by a secretary." And it was ruled they were not personally bound, though Crompton and Willes, JJ., doubted.

Randall v. Van Vechten, 19 Johns. 60, is a leading case in New York, and has been extensively noticed elsewhere. There the defendants, describing themselves as a committee of the corporation of the city of Albany, entered into a written contract with the plaintiff, under their individual hands and seals, for a survey of the city, etc. It was held, authority being conceded, that the defendants were not liable individually. So in *Brockway v. Allen*, 17 Wend. 40. The trustees of a Baptist society made a promissory note in the usual form, and signed as such trustees. In an action against them to hold them personally liable, they pleaded the note was given for a debt due by the society to the plaintiff, and that they were duly authorized to make such note; and it was held that such facts were properly pleaded in bar of the action averring knowledge on the part of the plaintiff. A similar decision is in the case of *Mott v. Hicks*, 1 Cow. 513.

The decision in *Hill v. Bannister*, 8 Cow. 31, holds differently from the preceding cases. There the defendants gave their note, with the addition of "Trustees of Union Religious Society," and proved that it was given for a debt due from the society. The court, however, held them personally liable. This decision is of questionable authority, and is opposed by *Brockway v. Allen*. On the other hand are cases holding trustees or directors personally liable on somewhat similar engagements. In *Dutton v. Marsh*, L. R. 6 Q. B. 361, four directors of a joint stock company signed their names to a promissory note thus: "We, the directors of the Isle of Man Slate Company Limited, do promise to pay J. D., one thousand six hundred pounds, with interest at six per cent. till paid, for value received." And at one corner of the note the company's seal was affixed, with "witnessed by L. L." It was held that the directors were personally liable as makers of the note, because there was nothing in the note itself to exclude this personal liability, and the fact that the company's seal was affixed was not sufficient to show that the note was signed on behalf of the company. A distinction is thus pointed out by Cockburne, C. J., in giving the opinion: "The effect of the authorities is clearly this, that where parties, in making a promissory note or accepting a bill, describe themselves as directors, or by any similar form of description, but do not state on the face of the document that it is on account, or on behalf of those whom they might be considered otherwise as representing—if they merely describe themselves as directors, but do not state that they are acting on behalf of the company—they are individually liable. But, on the other hand, if they state they are signing the note, or the acceptance on account of, or on behalf of some company or body of whom they are the directors and the representatives, in that case, as the case of *Lindus v. Melrose*, *supra*, fully establishes, they do not make themselves liable when they sign their names, but are taken to have been acting for the company, as the statement on the face of the document represented." This is probably the most successful attempt at reconciling the decisions on this point. In the case of sealed contracts made by trustees or directors, where they do not specially undertake on behalf of the bodies for whom they contract, they are held to a personal liability, as in *Tippets v. Walker*, 4 Mass. 595. This was a contract for constructing a turnpike road. In it the committee agree to make the several payments there mentioned, and enter into further stipulations, and the trustees signed with their private seals. Parsons, C. J., gave the opinion, holding the committee personally responsible. He says: "If the defendants have, by their deed, personally undertaken to pay, they must be holden. To the agreement the defendants have not (if they had legal authority) put the seal of the directors or the seal of the corporation; but have put their own seals. It is therefore their deed, and if it be not their covenant, it is not the covenant of any person or corporation; and the apparent intent of the plaintiff to have his payments secured by a covenant will be defeated." The authority of this case was followed in *Fullam v. Brookfield*, 9 Allen, 1, where a contract was in this form: "We, the undersigned, a committee chosen by the town of A., to finish the basement of their town-house, do hereby agree to pay," etc., for the finishing of said basement, and signed and sealed by the committee as "committee for the town;" and it was held that this was not the contract of the town, but of the individuals who signed it. To the same point see: *Brinley v. Mann*, 2 Cush. 337.

4. NOTHING APPEARING AS TO FACT OF AGENCY.—Where an agent signs without disclosing his agency either by the form of his signing or by

any allusion in the body of the instrument to the fact of agency, his principal can be held liable as well as himself, except in the case of sealed contracts and negotiable instruments, and parol evidence is admissible to charge the undisclosed principal. Thus it is stated in Byles on Bills, 37: "The rule of law as to simple contracts in writing, other than bills and notes, is that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract; but it is inadmissible for the purpose of discharging the agent, who signs as if he were principal in his own name. As the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, for it admits the agent to be entitled or bound; but in the latter case such evidence would be inconsistent with the terms of the instrument." As confirming this, see Wharton on Agency, sec. 296; *Lerned v. Johns*, 9 Allen 421. In a late case in New York, *Briggs v. Partridge*, 64 N. Y. 357; a. c. 21 Am. R. 617, there is a summary of the authorities on this point. It is there said by Andrews, J.: "The plaintiff invokes in his behalf the doctrine that must now be deemed to be the settled law of this court, and which is supported by high authority elsewhere, that a principal may be charged upon a written parol executory contract although the name of the principal does not appear in the instrument and was not disclosed, and the party dealing with the agent supposed that he was acting for himself and this doctrine obtains as well in respect to contracts which are required to be in writing as to those where a writing is not essential to their validity: *Higgins v. Senior*, 8 M. & W. 834; *Truman v. Loder*, 11 Ad. & El. 594; *Dykers v. Townsend*, 24 N. Y. 61; *Coleman v. First*, N. B. of Elmira, 53 Id. 393; *Ford v. Williams*, 21 How. 289; *Huntington v. Knox*, 7 Cush. 371; *Eastern R. R. Co. v. Benedict*, 5 Gray, 566; *Hubbert v. Borden*, 6 Whart. 91; *Browning v. Provincial Ins. Co.*, L. R. 5 P. C. 263; *Calder v. Dobell*, L. R. 6 C. P. 486; Story on Agency, secs. 148, 160."

In regard to negotiable paper, on account of its qualities, none but those appearing on its face as bound, can be held liable; and hence no evidence can be admitted to charge parties whose names do not appear thereon: Byles on Bills, 37; Wharton on Agency, sec. 290. A case in Maryland shows when an exception is made to this general rule: *Haile v. Peirce*, 32 Md. 327; S. C. 3 Am. R. 139. Here, a note was given which read: "Four months after date, we, the president and directors of, * * * promise, etc.," and was signed by the president, two directors, and secretary. In an action to recover on the note, it was held that parol evidence was admissible to show that the drawers of the note signed it as agents of the company, and not as individuals, and that the note was accepted as the note of the company. The court particularly pointed out the ground of the decision, saying that "where its language or terms are so unintelligible as to admit of no rational interpretation of the meaning, or are not sufficiently decisive of the intention of the parties, but on the contrary, are equivocal and uncertain, extraneous proof, as between the original parties, may be admitted to show the true character of the instrument, and what party, the principal or the agent, or both, is liable." The same is held in *Gerber v. Stuart*, 1 Montana, 172, on the authority of *Sayer v. Nichols*, 7 Cal. 535; *Melledge v. Boston Iron Co.*, 5 Cush. 158.

KIRWAN v. LATOUR.

[1 HARRIS & JOHNSON, 289.]

INSOLVENT DEBTOR—WHEN CAN MAINTAIN ACTION.—An action may be maintained in the name of an insolvent debtor, unless a trustee has been appointed who has accepted the trust, and to whom a conveyance has been executed.

FIXTURES, WHAT MAY BE REMOVED.—Where a lot and still-house thereon was sold by the sheriff on execution, it was held that the pumps, cisterns, iron grating and door, distillery and horse-mills, passed to the purchaser, but not the joists, vats, buckets, pickets and fossets, which were not fixed to the freehold.

TROVER to recover damages for forty-eight vats and covers, stills, worms, buckets, etc. It appeared in evidence that a house and lot belonging to the plaintiff had been taken under a *fi. fa.*; that the defendant became the purchaser at the sale thereof, to whom the sheriff, by deed, conveyed the house and lot, with the improvements. The house had been built for a distillery, and the implements necessary to carry on the business were on the premises at the time of the sale.

Hollingsworth, for the defendant, maintained that the action could not be brought in the name of the present plaintiff, who had taken advantage of the act of assembly of January 3, 1800, passed for the relief of insolvent debtors; that annexed to plaintiff's petition to be released by virtue of said act was a schedule of his property, enumerating, among other things, "a still-house and apparatus, and utensils for carrying on a distillery;" that plaintiff was released by the chancellor in February, 1802, and John Coulter appointed trustee; and that Coulter was empowered by the act to sue for and recover any property assigned to him by the plaintiff. Counsel therefore prayed the court to direct the jury that plaintiff could only support an action for damages for the use of the property to the third January, 1800, and that to recover the value of the property the action must be brought in the name of the trustee.

Harper, for the plaintiff, contended that Kirwan could support the action in his own name, as no deed had been made to the trustee, nor any evidence been offered of the acceptance of the trust by the trustee.

CHASE, C. J. The legal right to the property remains in the plaintiff until there is an acceptance of the trust by the trustee, and a deed of assignment executed by the insolvent debtor, transferring all his property to his trustee. The person of the

plaintiff is discharged, but he is still liable to be sued, and execution may go against his person and property.

Hollingsworth then moved the court to direct the jury that the apparatus and utensils for carrying on a distillery were fixtures, and passed to the defendant by the sheriff's deed, which set forth the premises, "with the improvements thereon."

Harper contended that whatever is part of the implements of trade may be removed, and are not considered as fixed to the freehold: 1 Atk. 477.

CHASE, C. J. The question arises upon the operation of the schedule annexed to the *fieri facias* and the sheriff's deed. It must be considered as a case between vendor and vendee, the sheriff standing in the place of vendor, and selling his right. In this case everything passed which was annexed to the freehold. If the deed had been for the conveyance of the house and lot only, without mentioning the improvements, it would have carried all things fixed to the freehold. The case of vendor and vendee is different from that of landlord and tenant. In the latter case, the law allows the tenant to remove many things which may be considered as fixed. This is for the benefit of trade; and where a tenant puts up anything for the purpose of carrying on his trade, he may remove it. The pumps, cisterns, iron grating and door, distillery and horse-mills passed by this deed, but not the joists, vats, buckets, pickets and fossets, which are not fixed to the freehold: Esp. 358, 359; Salk. 368; Bull N. P. 34.

Verdict for the plaintiff for four hundred and eighteen pounds seventeen shillings and sixpence current money.

PANCOAST'S LESSEE v. ADDISON.

[1 HARRIS & JOHNSON, 360.]

STATUTE OF LIMITATIONS, WHEN NO BAR.—The statute of 21 James I, Ch. 16, being in force in Maryland, and the words "beyond seas" therein being synonymous with the words "out of the state," therefore a non-resident of the state, but who is a resident of one of the United States, is not barred by the statute of limitations in an action of ejectment.

GENERAL REPUTATION AS EVIDENCE.—General reputation and tradition in a family of the death of one of its members, and of his having died possessed of land, is admissible in evidence as a part of a chain of testimony to prove relationship in an action of ejectment brought by a member of the family claiming land by descent from the deceased.

EJECTMENT for a tract of land called Pencott's Invention, in Prince George's county. The defendant based his claim upon the plats made and returned in the cause for two tracts of land, called The Discovery and Gainsborough Manor, and located his possession thereof by actual inclosures made in 1772 and continued to the present time.

The plaintiff gave in evidence a grant to James Pencott, dated December 1, 1687, for the tract called Pencott's Invention; that Pencott died seised of the premises before the year 1734, in the province of Maryland, having made no will, and leaving a brother William, his heir at law, residing in the province of New Jersey; that William and his heirs resided from that time until within six years last past in New Jersey, and that they, nor either of them, had come into Maryland in the intermediate time; that the plaintiff's lessor is the heir at law of the grantee, James Pencott, and first came into Maryland within six years past.

Defendant replied that the said tract of land was escheated in the year 1734, and patented to Lewis Wilcoxon, who, in 1738, for a valuable consideration, sold the same to Thomas Addison; that by regular mesne conveyances the land came into possession of the defendant; that the defendant, and those under whom he claims, have been in the actual possession and enjoyment of the premises from 1734 to the present time; and that they have paid quit rents therefor from 1734 to 1775, and taxes to the state of Maryland ever since.

Martin, Attorney-general and Gantt, for the plaintiff.

Key, Shaaf and Mason, for the defendant.

CHASE, C. J. The question before the court is, whether a person residing out of the state is within the saving of the statute 21 James I, Ch. 16.

It is admitted that this question has not been decided by the courts of Maryland. If it has undergone a judicial decision, such decision has not been referred to. The importance of this question has induced the counsel to go into a very full and elaborate discussion of it, and great ingenuity has been displayed in raising and obviating the difficulties which have been suggested to the court. The clause of the statute which relates to the case, is in the following words: "That no person or persons shall at any time hereafter make any entry into any lands, tenements or hereditaments, but within twenty years next after his or their right or title which shall hereafter first

descend or accrue to the same, and in default thereof such person so not entering, and their heirs shall be utterly excluded and disabled from such entry after to be made, any former law or statute to the contrary notwithstanding; provided nevertheless, that if any person or persons, that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be, at the time of the said right or title first descended, accrued, come, or fallen, within the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done, before this act; so as such person and persons, or his or their heir and heirs, shall within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue for the same, and at no time after the said ten years." This statute has been adopted by the courts of Maryland as applicable to our situation.

To ascertain the meaning of the words "beyond the seas," and to show in what sense they have been understood by the judges of England, the parliament and law writers, the common law of England, acts of parliament and adjudged cases have been referred to. It appears to me, upon the best consideration I have been able to give the able and diffusive arguments of the counsel, and the authorities cited, that "beyond the four seas" and "out of the realm" are synonymous, and mean precisely the same thing. Prior to the union of the two crowns of England and Scotland, on the accession of James I, the words "beyond the four seas," "beyond the seas," and "out of the realm" meant and signified out of the limits of the realm of England. After the union of the two crowns, and at the time the act of parliament under consideration passed, the above words meant out of the realm of Great Britain, including England and Scotland. This explanation of the words, according to my judgment, will serve or go a great way in solving the difficulties which have occurred in the discussion of the question.

In the case of bastardy, according to the common law of England, if the *baron* was within the four seas from the time of the conception to the birth, the child was legitimate, access being presumed, unless the *baron*, from imbecility or some bodily

infirmity, was incapable of getting a child. The late decisions allow of proof of non-access to bastardize the issue, and so is the law established. According to my judgment, if the *baron* was in Ireland from the time of the conception to the birth, the issue would be a bastard; Ireland being a distant realm, and not within the four seas or realm of England. The case in Rolle's Ab. 358, which seems to be the puzzle peg, is either to be reconciled in the following manner, or is overruled in *Rex v. Atherton*, 1 Ld. Raym. 395, to which case Lord Baron Gilbert, in Bac. Ab. 310, refers.

The case in Rolle is, if the husband is in Ireland while the wife goes with child, such child is not a bastard; the reason added is what occasions the doubt, because he is within the the king's dominions. If a special verdict had found that the *baron* was in Cadiz while the wife was going with child, the decision would have been the same, because the husband must be beyond the four seas at the conception, and at the birth, as well as during the pregnancy, and on the above finding in Rolle, the court could not adjudge the issue to be illegitimate.

In Raymond, the court decided he is a bastard who is begotten and born of a *feme covert* while her husband is beyond the four seas. But, independent of this, I think a person residing out of the state of Maryland is within the saving of the act of parliament as adopted by Maryland. This opinion, I trust, is according to the true construction of the act of the decision in *King v. Walker*, 1 W. Bl. 286, and consonant to the principles of justice.

The second section of the act is in the following words: " Provided, nevertheless, that if any person or persons that is or shall be entitled to such writ or writs, or that hath or shall have such right or title of entry, be or shall be at the time of the said right or title first descended, accrued, come or fallen, without the age of one and twenty years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas, that then such person and persons, and his and their heir and heirs, shall or may, notwithstanding the said twenty years be expired, bring his action, or make his entry, as he might have done before this act; so as such person and persons, or his or their heir and heirs, shall, within ten years next after his and their full age, discoverture, coming of sound mind, enlargement out of prison, or coming into this realm, or death, take benefit of and sue forth the same and at no time after the said ten years." The concluding words, " coming into this realm," point out the

meaning of the parliament. They stand in opposition to "beyond the seas," and indicate plainly the intention of the legislature was to comprehend all persons within the saving who were out of the realm of Great Britain; and in that manner was the act of parliament understood by the judge in *King v. Walker*, 1 W. Bl. 286; which I think can be plainly understood. Mr. Justice Dennison says: "He must be beyond the seas, that is the old and true expresion," to signify being out of the realm. The common law expression was beyond the four seas; but beyond the sea and beyond the four seas, in the language of the laws of England, meant the same thing. Mr. Justice Wilmot says: "There is no such kingdom as England now, the plaintiff, therefore, while in Scotland, was not out of this realm," the realm of Great Britain. With reference to England before the union, Scotland, although not actually beyond the seas, was considered as beyond the seas because out of the realm. The situation of England and Scotland, before the union, was similar or nearly so to the actual situation of Maryland to Pennsylvania. The latter were separated by an ideal or mathematical line, the former were different realms or sovereignties, governed by different laws. Scotland, before the union, was beyond the seas in legal contemplation, although with England it was encompassed by the four seas. Why? Because it was out of the realm of England.

The adoption of the statute in this state is the same as re-enacting it. The statute of limitations with the savings, is a beneficial law for the purpose of quieting possessions, etc., but without the savings it would be a rigorous and unjust law. It does not extend to persons out of the state who cannot be supposed to know the laws. The court are of opinion that the lessor of the plaintiff is within the saving of the statute of 21 James I, ch. 16, and that the statute of 32 Hen. VIII, ch. 2, s. 2, does not extend to the state of Maryland, the court not knowing of any judicial decision by which the same has been adopted and introduced into this state as the law thereof.

The defendant excepted.

The plaintiff then offered to read in evidence the deposition of Mary Hewes, the daughter of William Pancoast, who was the grandfather of the lessor of the plaintiff. The defendant's counsel objected to the reading of that part of the deposition contained in the following words, as incompetent and inadmissible testimony, viz.: "That the land lay in Maryland between Belle Haven and George Town; that some time after the death of

the brother in Maryland, the family in the Jersey were informed of his death, and that he died without a will. He died a bachelor, and it was generally reputed in the family that the land he died possessed of was held by the family in which he had lived as aforesaid. This knowledge this deponent gained in Jersey, and it was the common talk, reputation, and tradition in the family."

But the Court, CHASE, C. J., DUVALL and DONE, JJ., overruled the objection, and admitted that part of the deposition to be read to the jury.

The defendant excepted, and then objected to the reading in evidence of that part of the same deposition, which is in the following words: "She has heard her father and others of the family, now dead, say that her grandfather and Joseph Pancoast, his brother, emigrated from England; that before they emigrated, they had a younger brother who had been bound apprentice to a mechanic; and as well as she recollects, to a watchmaker, in London; that this brother was kidnapped from London, and brought to Maryland, and sold by the captain of the vessel to some gentleman in Maryland," etc.

But the court overruled the said objection, and admitted that part of the said deposition to be also read in evidence to the jury.

The defendant excepted.

Plaintiff then offered the testimony of Edward Pancoast, taken under a commission which had issued in this cause, and the defendant offered to prove that Edward Pancoast was the son of William Pancoast, the grandfather of the plaintiff's lessor, and under whom the latter deduced his title to the premises as heir at law. Defendant objected to the reading in evidence the answers of Edward Pancoast to the fifth, sixth, seventh, eighth, and ninth interrogatories put to him under the commission, on the ground that witness derived his information from William Pancoast, who was interested, and who, at the time of giving the information, was heir at law, and claimed the title to the premises mentioned in the declaration, and for which this action had been brought. The interrogatories and answers are:

Fifth interrogatory: Did you know, or have you ever heard, or been informed, and how and by whom, of one William Pancoast, the eldest, formerly of Burlington county, Jersey; if yea, then was he a native of America, or of what country was

he a native; had he any brothers and sisters; if yea, what were their names, where did they live, when did they die; did they leave any issue, and what issue did they leave?" Answer: "That he neither knew, or ever heard of any William Pancoast older than William Pancoast, the great-grandfather of William Pancoast, the plaintiff; but that the great-great-grandfather of William Pancoast, the plaintiff, and the great-grandfather of this affirmant was named John Pancoast, who, as this affirmant has been informed by his father, originally came from England, and settled in the township of Mansfield, in the county of Burlington, in the state of New Jersey, and that he was a native of England; and that the said John Pancoast had no brothers or sisters, as this affirmant ever heard of, but that he brought with him two sons, William and Joseph; that he had a third son by the name of James, who was kidnapped in England, brought to Maryland, in America, and sold, as this affirmant hath been given to understand by his father."

Sixth interrogatory: The same with respect to James Pancoast as the fifth respecting William. Answer: "That he hath been informed by his father that James Pancoast, mentioned in the answer to the fifth interrogatory, was a native of England; that he bought a tract of land and settled in Maryland, on the Potomac; that he came afterward to see his brothers, William and Joseph, in New Jersey; that he concluded to sell his lands in Maryland and come and live in New Jersey; that he returned to Maryland and was afterward drowned in the river Potomac, as this affirmant hath been given to understand by his father; that he never heard of his having any heirs but his two brothers, William and Joseph."

Seventh interrogatory: "Do you know or have you ever been informed, and how or by whom of the Pancoast family; if yea, from what country did they emigrate to this; where did the first emigrants of that family settle in America, and who are the descendants of that family? Relate as fully as you can." Answer: "That he has been informed by his father that the Pancoast family emigrated from England to America; that the first emigrants settled in the township of Mansfield, in the county of Burlington, in the state of New Jersey, except James Pancoast who settled in Maryland, as mentioned in the answer to the sixth interrogatory."

Eighth interrogatory: Answered by the answers to the fifth and sixth interrogatories.

Ninth interrogatory: "Whether James Pancoast died with-

out issue, etc., and who were his nearest relations of the whole blood?" Answer: "That he hath been informed by his father that the said James Pancoast died without issue; that his nearest relations of the whole blood were his two brothers, William and Joseph."

The Court were of opinion that the said testimony was legal and competent, and permitted the same to be read in evidence to the jury.

The defendant excepted.

Verdict and judgment were rendered for the plaintiff; the defendant thereupon appealed to the court of appeals where the case was entered, agreed at June term, 1805.

GILL v. COLE.

[1 HARRIS & JOHNSON, 403.]

ACTION OF TRESPASS AFTER RECOVERING MESNE PROFITS.—A recovery of mesne profits is no bar to an action of trespass *quare clausum fregit*; therefore, the removal of fence rails is a trespass, and for which damages may be recovered in an action of trespass *quare clausum fregit*, notwithstanding a recovery in an action for mesne profits, unless such removal was necessary for the use and occupation of the land.

TRESPASS *quare clausum fregit*, for breaking and entering Cole's Struggle on the first January, 1800, and removing a fence, with a *continuando* on divers days between that time and the first January, 1801. The writ issued thirty-first March, 1801. The defendant pleaded not guilty, and issue was joined. A warrant of resurvey issued, and the plats were returned.

It appeared that the plaintiff's lessee brought an action of ejectment against the defendant for Cole's Struggle and Strife on the thirteenth May, 1794, and, at the May term, 1797, recovered judgment against the defendant for a part of Cole's Struggle; that this judgment was affirmed by the court of appeals, in June, 1800, and on the twenty-ninth October, 1800, a writ of *habere facias possessionem* issued and the possession delivered to the plaintiff's lessee; that on the eighth July, 1801, plaintiff commenced an action of trespass for mesne profits against the defendant, for the use and occupation of Cole's Struggle and Strife from June 10, 1793, to October 29, 1800, to which the defendant, in November, 1802, confessed judgment for thirty dollars damages and costs.

The plaintiff gave in evidence, that the defendant, in Sep-

tember, 1799, removed one hundred and eighty-five panels of fence from a part of Cole's Struggle, which had been placed there by the defendant; that that part of Cole's Struggle belonged to plaintiff; and that defendant was in possession there from the institution of the action of ejectment by the plaintiff's lessee, to the execution of the writ of possession.

The defendant gave in evidence the action of ejectment, recovery of part of Cole's Struggle, the affirmance of the judgment, the writ of possession and the proceedings in the action for mesne profits above mentioned, and prayed the court to direct the jury that the recovery in the action for mesne profits was a bar to the present action of trespass.

Martin, attorney-general, and Key, for the plaintiff.

Hollingsworth and Mason, for defendant. They cited *Run. Eject.* 164, 165, 166, 167.

CHASE, C. J. The court are of opinion that in an action for the mesne profits the plaintiff recovers damages for the use and occupation of the land, and that a recovery in such action is no bar to an action of trespass, for a trespass committed on the land during the said time for the recovery was had for the mesne profits. The court are also of opinion that the removing of the fence in this case was a trespass, unless it appears to the jury that such removal was necessary for using and cultivating the land, and was made for that purpose.

The defendant excepted. Verdict and judgment for the plaintiff. On appeal to the court of appeals the judgment was affirmed at the June term, 1805.

In *Cunningham v. Morris*, 19 Ga. 584, reference was made to this case by the court saying: "Notwithstanding the cases in 1 Harr. & J. 403, and 2 Haywood, 381, seemingly to the contrary, we take it to be well settled that as the action for mesne profits is an action for trespass *vi et armis*, the jury are not confined in their verdict to the mere rent of the premises, although the action is said to be brought to recover the rents and profits of the estate, but may give such extra damages as they may think the particular circumstances of this case may demand."

SHARPE v. GIBSON.

[1 HARRIS & JOHNSON, 447.]

EVIDENCE INADMISSIBLE IN ACTION FOR PURCHASE MONEY.—In an action for the purchase money for land sold and conveyed, parolevidence cannot be given by a witness to show that he was seised of any part of the land conveyed, in order to rebut the claim and title of the vendor to any portion of the land included in the deed, or to show that the title to any part of the land so conveyed was not in the vendor at the time of the conveyance.

DEBT upon a writing obligatory, dated August 29, 1797, conditioned for the payment of nine pounds current money per acre, for as many acres of land as plaintiffs should make the defendant, his heirs, etc., a good and legal title to in Island Creek Neck, agreeably to a bond of equal date given by the plaintiffs to defendant. Pleas: general performance, and that the plaintiff had not made defendant a good and legal title, etc. The plaintiffs replied, non-performance; that prior to the commencement of this action, they had a good and legal title to three hundred and eighty-five acres and twenty-five perches in Island Creek Neck, and that on the eighteenth May, 1799, they executed and delivered to defendant a good and valid deed of bargain and sale, for, all and singular, their interest therein, agreeable to their bond; that said land, at nine pounds per acre, was worth three thousand four hundred and sixty-six pounds eleven shillings and one penny. To the second plea there was a similar replication, exhibiting the deed in *hæc verba*. Defendant rejoined, and issues were made.

The defendant offered Thomas Martin as a witness to prove that he had a valid claim to thirty-eight acres of the land which plaintiffs had located as a part of the tract sold to the defendant; that witness was seised of that portion located on the plaintiff's plat, known as Rich Neck; that a correct location of the lines of the said tract would not interfere with witness's claim; and that witness had cut trees within the lines of Rich Neck as claimed by plaintiffs, in order to provoke an action of trespass to try the title to the same; that an action for that trespass, brought by the defendant, was now pending.

The plaintiff objected to the testimony as inadmissible.

DONE, J. The court are of opinion that the evidence offered by the defendant is not competent and legal evidence to go to the jury to rebut the claim and title of the plaintiffs to any part of the lands to which they claimed title, and which are included

in their deed to the defendant; or to show that the title to any part of the lands so conveyed was not in plaintiffs at the time of making the conveyance to the defendant.

The defendant excepted. Verdict and judgment were rendered for the plaintiff, whereupon defendant appealed.

J. Bayly, for the appellant.

Harper and Scott, for the appellees.

The court of appeals, at the June term, 1805, affirmed the judgment of the general court.

CHENEY'S LESSEE v. WATKINS.

[1 HARRIS & JOHNSON, 527.]

WHAT CONSTITUTES A DEED OF BARGAIN AND SALE.—To constitute a deed of bargain and sale there must be a money consideration, or general words of consideration, under which a pecuniary consideration may be alleged; other land being stated as the consideration is not sufficient.

SAME.—If “divers good causes and considerations” are used in the deed, without an express reference to any other consideration, the party may aver what the consideration was, and if this be money, it will make it a deed of bargain and sale.

COVENANT TO STAND SEISED.—If the consideration is love, marriage, or natural love and affection, the deed will operate as a covenant to stand seized.

DEED TO HAVE OPERATION IF POSSIBLE.—If a deed will not have operation in one way, it may operate in some other way; and although a deed cannot operate as a bargain and sale, it may operate as a feoffment.

DEED AS EVIDENCE.—Neither the record of enrolment nor a copy of a deed, not directed by law to be enrolled, can be admitted in evidence.

ESSEMENT for a tract of land called Cheney's Hazard. The defendant rested his defense on warrant, and plats were returned. General issue, and joinder thereon.

The plaintiff read in evidence a patent for the land described in the declaration granted to Richard Cheney May 30, 1663, for one hundred acres more or less, and offered to prove that the lessor of the plaintiff was the heir at law of the patentee.

The defendant then produced a copy of the rent roll legally authenticated, viz.: “100 acres, Cheney's Hazard, surveyed twenty-fourth December, 1661, for Richard Cheney, on the south side of South River, Poss., John Durbin. Alienations: 100. Patrick

Symson from Samuel Burgess and *uxor*, seventeenth February, 1719. 100. Richard Hill from Patrick Symson and Eleanor, *uxor*, third November, 1724. 100. David Macklefish from Richard Hill, fourth April, 1726." Defendant then offered in evidence the will of John Durbin, dated October 9, 1715, whereby he devised the land called Cheney's Hazard to his wife Elizabeth, "to be entailed upon the said Elizabeth and her heirs, neither to be sold nor mortgaged, if the said Elizabeth has heirs by her own body, and the said heirs live to the years of twenty-one, to enjoy the said land, otherwise the son of Dorothy Collingsworth to enjoy the said land for him and his heirs;" and a deed of the premises in question, dated seventeenth February, 1719, from Samuel Burgess and Elizabeth Durbin, who had intermarried with Burgess, to Patrick Symson. The acknowledgment of this deed on the part of the wife is as follows: "Elizabeth, the wife of the said Samuel, who being by me secretly examined out of the hearing of her said husband, declared that she acknowledged the within land and premises to be the right of the within named Patrick Symson, his heirs and assigns forever, free from any threats or fears of her said husband's displeasure." The deed from Symson and wife to Richard Hill, dated twenty-third November, 1724, was next read; and defendant then produced the original land records of Anne Arundel county, wherein was what purported to be a deed from Richard Hill to David Macklefish, dated April 4, 1726, which defendant offered to read. It recited that for and in consideration of two tracts of land, lying in Anne Arundel county, the one containing one hundred acres, and the other known as Sutton's Addition, adjoining the former, and containing twenty acres, more or less, Richard Hill hath given, granted, bargained, set over, sold and confirmed, and doth for himself, his heirs, etc., give, grant, bargain, set over, sell and confirm unto David Macklefish, his heirs, etc., forever, one tract of land laid out for Richard Cheney the twenty-fourth day of December, 1661, called Cheney's Hazard, lying in the county aforesaid, beginning, etc., containing one hundred acres more or less, now in the tenure and occupation of David Macklefish, etc., to have and to hold unto David Macklefish, his heirs, etc., forever, to the only proper use and behoof of the said David, his heirs, etc., and to no other use, intent or purpose whatsoever, with covenant of warranty.

Martin, attorney-general, and Kitty, for the plaintiff, objected to this deed being read as one of bargain and sale because the

consideration expressed, that of land, was not sufficient to make it such: 1 Bac. Ab. 463, 469; Gilb. on Uses, 50, 51, 82, 112, 296; 2 Bl. Com. 338. The land given in exchange is not a valuable consideration since no title in that land passed to the grantor by this deed. If the original had been produced and proved, the deed might have been read as a feoffment.

Shaaff and Johnson, for the defendant, contended that prior to the statute of uses this deed would have raised a use effectual in equity, and that now, therefore, a use will be raised and the statute will transfer the possession. The same words that would create a use at common law will make a bargain and sale on a valuable consideration: 2 Inst. 672. A valuable consideration means a recompense given: Shep. Touch. 218. There must be a moneyed or other valuable consideration: Id. 220. 1 Bac. Ab. 469, referring to 1 Co. Rep. 176, says: it must be money or other good consideration. Land is a valuable consideration, and there are no determinations that deeds expressing land as the consideration are void. This deed may be read as a feoffment without proof of its execution, as the original record is produced in court: *Gittings v. Hall*, ante, 502.

CHASE, C. J. It seems to be taken for granted by the counsel that unless the deed can operate as a bargain and sale it cannot operate at all. But the court think differently upon inspecting the deed. It may operate as a feoffment, there being words "give and grant," if livery of seisin can be proved, and there may be circumstances from which livery may be presumed. It cannot be a deed of bargain and sale without a money consideration, or unless there are general words of consideration under which a pecuniary consideration may be averred. If the consideration is blood, marriage, or natural love and affection, it will operate as a covenant to stand seised, as in 2 Wilson, 22, 23. If "divers good causes and considerations" are used without mentioning any specific consideration, the party may aver what the consideration was. If money be averred as the consideration, it will make it a deed of bargain and sale.

The court will lean toward giving validity to a deed. If it will not have operation in one way it may operate in some other way. These positions were laid down in this court in the case of *Paca v. Forwood*, 2 Har. & McH. 175. This, therefore, not being a bargain and sale or deed directed by law to be enrolled, neither the record nor a copy is evidence. The court are therefore of opinion that the said enrollment is no evidence, as the

said deed could not operate as a deed of bargain and sale, there not being any money consideration expressed therein.

The defendant excepted and then offered to read from the original records brought into court by the register of Anne Arundel county, a document purporting to be the will of David Macklefish, dated June 6, 1737, whereby he devised Cheney's Hazard to his wife for life, remainder in fee to his son, to prove that David Macklefish was in possession of that land and claimed title to it. The will appeared to have been signed in the presence of two witnesses.

Plaintiff objected to this evidence.

CHASE, C. J. The court are of opinion that the record is not legal and admissible evidence to prove that David Macklefish claimed the land in question, and was in possession thereof, claiming title to the same, the said will not being attested by three witnesses.

The defendant excepted.

Plaintiff further, to prove the issue on his part, gave evidence that Richard Cheney, the patentee as aforesaid, died, leaving Richard Cheney, his eldest son and heir at law, who, on the tenth December, 1707, married Rachel Nicholson; that Elizabeth Cheney, a daughter of this marriage, in 1725 married Greenbury Cheney, by whom she had Zachariah, the lessor of the plaintiff, who removed from Maryland to Pennsylvania upwards of forty-two years since and has there remained ever since. He proved the lease, entry and ouster as laid in the declaration.

Defendant, in addition to the evidence already adduced, offered to prove that Richard Macklefish was the grandson and heir at law of David; that being seised thereof on the third March, 1763, he duly conveyed the premises in question to Joseph Howard, who, also, on April 23, 1774, received a deed for the same land from Richard Burgess, the heir at law of Samuel Burgess and Elizabeth, his wife; that by will, dated tenth December, 1777, Joseph Howard devised the land to Benjamin Howard; that after the death of Benjamin Howard, an order issued out of chancery for the sale of the real estate for the payment of his debts, and that at such sale in the year 1794, the lessor of the defendant in this action became the purchaser of Cheney's Hazard; that no person by the name of Cheney has been in the possession of the tract in question since 1710, but that the same has been held by John Durbin and wife and those claiming under them. Whereupon defendant prayed

the court to direct the jury, that if they are of opinion from the evidence given, that the facts as stated by defendant are true, and that even, although they are also of opinion that the facts stated by the plaintiff are true, then they ought to presume that the said patentee, Richard Cheney, or his son, conveyed the land in the declaration mentioned to John Durbin.

CHASE, C. J. The court are of opinion that if the jury believe that Elizabeth Durbin, the devisee in the will of John Durbin, intermarried with Samuel Burgess, then there is a clear deduction of title, possession, etc., to presume a deed to John Durbin from the patentee, or from his son Richard, and the court give the direction to the jury as prayed for by the defendant.

The plaintiff excepted.

Verdict and judgment for the defendant.

BROSIOUS v. REUTER.

[1 HARRIS & JOHNSON, 551.]

RETURN TO A MANDAMUS.—In a return to a *mandamus* the same certainty is required as in declarations and pleadings, and nothing can be supplied by intendment or inference.

FACTS STATED IN RETURN.—The facts stated in a return to a *mandamus* are supposed to be true, and are not traversable; if they are false, the remedy is by action against the person making the return.

MANDAMUS to restore or caused to be restored the prosecutor into the place and function of minister of “The Saint John’s German Catholic Church of Baltimore,” in the city of Baltimore, and to the use of the pulpit and altar of that church, and of the parsonage house thereof, and of and singular the effects, property, rights, privileges, liberties and functions, to the said church, altar and pulpit, and to the office and duty of rector or priest of the said congregation, in anywise belonging or appertaining, or to signify to the court here cause to the contrary thereof, etc. Proof was made of the service of the *mandamus* on each of the defendants.

The defendants made the following return, to wit: We, Cæsarius Reuter, etc., the parties to whom the writ hereto annexed is directed, by virtue of the writ aforesaid do most humbly certify to the judges of the general court, sitting in the general court for the western shore of Maryland, that the persons named in the said writ are members of a congregation of christians, associated together for the purpose of divine

worship in the city of Baltimore, and Baltimore county, and are denominated "the Saint John's German Catholic Church of Baltimore." We do further certify that the said Cæsarius Reuter was duly elected and chosen, by a majority of the members of the said congregation, minister thereof, and that he still continues to exercise his ministerial functions with the approbation and consent of the said majority. And we do further certify, that the said Cæsarius Reuter was put into possession of the church of the said congregation, and of the use of the pulpit thereof, as minister of the said congregation, with all the liberties, privileges, and advantages to that place and function belonging and appertaining, and that the said minister, so elected and put into possession, holds the place and function of minister of said congregation, by the will and assent of a majority of the members of the said congregation. And we do further certify, that the said Francis X. Brosius has been appointed minister by the Right Reverend John Carroll, Bishop of Baltimore, without the previous consent and approbation of the majority of the members of the said congregation, and in opposition to their declared wishes and choice, and contrary to the rules, laws and canons of the catholic church. And we do further certify, that by the fundamental laws, usages and canons of the German Catholic Church aforesaid, to which we belong, that the members of the church, who found and built and contribute to the support of the church, and the pastor thereof, have the sole and exclusive right of nominating and appointing their pastor, and that no other person, whether bishop or pope, has a right to appoint a pastor without the assent and approbation of the congregation or a majority of the same. And we do further certify that the said Cæsarius Reuter is a regular clergyman belonging to the society called "the Minorits Conventuals of the order of Saint Francis," and that the said Cæsarius Reuter was sent back to the United States to found a German catholic church in Baltimore, according to the law of the said United States; and that in virtue of the said authority he, the said Cæsarius Reuter, and a majority of the congregation aforesaid did build, found, and erect the said church, called "the Saint John's German Catholic Church of Baltimore," and did place the said church under the sole and exclusive control of the said order, according to the law of the United States; of which said church, the said Cæsarius Reuter was put and appointed pastor, and still continues so to be; and that by the canonical law of the

Catholic church aforesaid, the said Caesarius Reuter owes obedience to the magistrate, and to said order, and to no other ecclesiastical person or body whatsoever. And therefore we cannot, nor can either of us, restore the said Francis X. Brosius into the said place and function of minister of the said church, called "the Saint John's German Catholic Church of Baltimore," and to the use of the church of the said congregation, and the pulpit thereof, as minister of the said congregation, with all liberties, privileges and advantages, to that place and function belonging, as by the writ aforesaid we are commanded. In witness whereof we hereto set our hands and seals, this thirteenth day of May, in the year of our Lord, 1805. Frid. Caesar. Reuter. (seal.) And also signed and sealed by the other defendants.

Harper, Hollingsworth and Kell, for the prosecution, moved the court to quash the return for insufficiency for the following reasons:

1. The return states that they belong to "The Saint John's Catholic Church of Baltimore," (which is a congregation professing the Catholic religion) and then states, that by the canons, etc., of that congregation, a majority may appoint, but does not show that in the Roman Catholic religion, a particular congregation can have separate canons. This being material, must be positively shown, and cannot be made out by inference or intendment.

2. It states, that the bishop appointed the prosecutor, "contrary to the rules, laws and canons of the Catholic Church," without showing in what respect the appointment was contrary to those rules, laws and canons, or what those rules, laws and canons are.

3. It states, that the said Caesarius Reuter was elected and put into possession by a majority, without showing when and where the said election took place; and how many members of the congregation there were at the time of the said election, and how many voted for the said Reuter; and that the meeting for the purpose of such election was held pursuant to the canons.

4. It states that by the canons, laws and usages of the German Catholic Church aforesaid, the members who found and build a church, and who contribute to the support of it, and of the minister, have the sole and exclusive right of nominating and appointing their pastor; but does not show particularly what those canons, laws and usages are, nor how they were established.

5. It states that the said Reuter, and a majority of the congregation, did erect the said church, and did place it under the direction of the society or order called "The Minorits Conventuals of the Order of Saint Francis," without showing when and by what persons particularly, and in what manner the said acts were done; and how many members there were of the said congregation at the time of doing these acts respectively, and the particular canon or laws by virtue of which the said acts are respectively supposed to have been done.

6. It states, that the said church was built and founded by authority from the aforesaid order or society, without showing the nature and extent of that authority, or the manner in which it was given, or the power of the said order or society to give such authority.

7. It states, that by the canonical law of the Catholic Church, the said Reuter owes obedience to the said order, and to no other ecclesiastical person, or body whatsoever, without showing particularly what that canonical law is.

8. It states, that the persons named in the return are members of "The Saint John's German Catholic Church of Baltimore," and that they, with a majority of the members, did certain acts, without showing how they respectively became members, or what number of persons joined with them in doing the said acts, and how those persons became members.

9. It claims an absolute exemption from ecclesiastical discipline and authority, which is inconsistent with the known rules and the constitution of the Roman Catholic religion, and is not warranted by the laws or constitution of this state or of the United States.

10. It does not show that the prosecutor was removed.

It is a general principle that every return to a mandamus must be a complete answer to the writ: *The King v. The Mayor of Abingdon*, Salk. 433; S. C. 1 Ld. Raym. 559. There must be the same certainty in a return to a mandamus as in pleadings: 5 Com. Dig. 7, 82, 83, 48; 4 Id. 215; Burr. 731; 3 Salk. 430, 433; 1 Show. 282; 6 Mod. 309; 1 Stra. 64; 2 Ld. Raym. 1566; 5 Mod. 258, 259. The matter must be so set forth in the return that the court may judge: Salk. 433; and inconsistency is fatal: Id. 436. The return in *Runkel v. Winemiller*, 4 H. & McH. 429 (1 Am. Dec. 411), was very special, yet this court held all the objections fatal, and particularly that which is the subject-matter of the ninth objection to the present return. Unless the return is sufficient a peremptory mandamus will issue.

Martin, attorney-general, Purviance and Boyd, for the defendants.

CHASE, C. J. (SPRIGG, J., concurring.) In the return to a mandamus, the facts which are requisite to justify a refusal to restore must be stated with precision and certainty. A defective and incomplete statement of facts cannot be aided or supplied by intendment or inference. All the authorities support the position that the same certainty is required in a return to a mandamus as is necessary in declarations and pleadings. The facts exhibited in the return must appear to the court to be a complete justification for refusing to restore, or the court will order a peremptory mandamus; and certainly there cannot be anything better established than that necessary facts not stated are not inferable or to be intended from facts which are set forth. The facts set forth in the return are supposed to be true, and are not traversable; and the court must decide whether they are a sufficient and legal cause to justify the refusal to restore. Should the statement of facts in the return be false, the remedy is by action against the persons who make the return, and to whom the mandamus was directed.

These principles, being recognized, will lead the court to a right decision in this case.

The court are of opinion that the return of Cæsarius Reuter, etc., to the writ of mandamus in this case is insufficient and defective in law, in not showing and setting forth, with precision and certainty, the rules, laws and canons of the Catholic church, which render the appointment of Francis X. Brosius, minister of "The Saint John's German Catholic Church of Baltimore," by the Right Reverend John Carroll, Bishop of Baltimore, unlawful, without the previous approbation of the majority of the members of the congregation of the said church, in not setting forth the fundamental laws, usages and canons of the said German Catholic Church, which vest the right and power of nominating and appointing the pastor of the said church exclusively in the members thereof, who did found and build the same, and do contribute to the support of the said church and pastor thereof; in not setting forth the rules and canons of the said church, which make the assent and approbation of the congregation of the said church, or a majority of them necessary to validate the appointment of the pastor by the said bishop; in not setting forth any rules or canons of the said Catholic Church, whereby "The Saint John's German Catholic Church of Baltimore" is placed under the superintendence and control

of the society called "The Minorits Conventuals of the Order of Saint Francis," in exclusion or derogation of the authority of the Pope, and of the said John Carroll, Bishop of Baltimore.

And thereupon the court quash the said return, and order a peremptory mandamus to issue to the Reverend Cæsarins Reuter, etc., to restore, etc.

Return quashed, etc.

WEST v. HUGHES.

[1 HARRIS & JOHNSON, 574.]

EXTENT OF RECOVERY OF MESNE PROFITS.—If the plaintiff can prove that his title accrued before the time of the demise laid in the action of ejectment, and that the defendant had a longer possession, he may recover the antecedent profits; but in that case, the defendant can controvert his title.

LIABILITY OF DEFENDANT FOR MESNE PROFITS.—From the time of the demise until the plaintiff is put in possession, the defendant is accountable for the profits. If another person enters into possession during the time the ejectment is pending, the defendant is still answerable, for it will be presumed the entry is made by defendant's consent; but if the defendant can prove that the plaintiff himself received the profits, he is not then liable for such profits.

MESNE PROFITS, HOW ASCERTAINED.—In an action to recover mesne profits, to ascertain the profits, the plaintiff may either prove the profits received from the land, or the probable value of the land.

JUDGMENT IN EJECTMENT.—In an action of ejectment to recover mesne profits, the defendant is not estopped by the judgment against him in ejectment, from proving that the plaintiff was in possession of the land between the date of the demise laid in the declaration and the judgment.

TRESPASS to recover the mesne profits of a tract of land called Jarrett's Disappointment, recovered in an action of ejectment, brought by plaintiff's lessee against the present defendant, twenty-fifth of January, 1798. The demise laid in the declaration of ejectment was on the first of July, 1797, to hold from thirtieth of June preceding, for a term of ten years, and the entry and ouster stated to be on the first of July, 1797. At the May term, 1800, plaintiff's lessee recovered judgment for all that part of Jarrett's Disappointment, for which the ejectment was brought. This judgment was affirmed on appeal, and possession delivered April 4, 1803, under a writ of *habere facias possessionem* issued March 8, 1803.

The writ in this cause, issued nineteenth of July, 1802, and

the declaration, stated that the defendant entered into the tract called Jarrett's Disappointment, on the first of July, 1795, and ousted the plaintiff from the possession and occupation thereof, and kept him out from July 1, 1795, to July 1, 1802, and during all that time received to his own use, all the issues and profits of the land, of the yearly value of one hundred pounds. There were three separate actions against separate persons for the mesne profits of the same tract, all brought at the same time, and ready for trial at the present term. The general issue was pleaded.

At the trial defendant's counsel asked a witness whether the plaintiff had not, during the pendency of the action of ejectment, been in possession of a part of the land for which the ejectment had been brought. Plaintiff objected.

Johnson, for the defendant, contended that as the demise in the action in ejectment was laid in 1797, and this action was for mesne profits from 1795, the question as to plaintiff's possession prior to 1797, was proper, and even as to the possession subsequent to 1797 the question might be asked, for if plaintiff had received any part of the profits, or cultivated any portion of the land, he ought not to recover.

Buchanan, for the plaintiff, contended that the record in the action of ejectment, was conclusive as to defendant's possession of the land subsequent to the demise, he having confessed lease, entry and ouster, and verdict being given against him for the whole of Jarrett's Disappointment, except a small portion of Contestable Manor No. 2. Plaintiff can recover mesne profits anterior to the demise in the ejectment suit. He may go as far back as he can prove his title and the defendant's possession.

CHASE, C. J., DONN and SPRIGG, JJ., concurring. This is an action to recover mesne profits, and the plaintiff must show, the best way he can, what those profits are. There are two modes of doing so, one of which he may resort to; either prove the profits received from the land, or the probable value of the land. The plaintiff here has resorted to the former mode. Although the recovery in the action of ejectment was for the whole land, the plaintiff must prove possession anterior to the demise in the ejectment, and that the defendant received the profits.

The defendant may also show that the plaintiff was in possession of part of the land, and received the profits of the part of

which he was possessed. Suppose a man had been in possession of land of which he had derived no benefit, he could not be compelled to pay more than the profits derived from it, if the plaintiff resorts to that mode of proving the profits. It is not like an action of trespass for damages. It is for the use and occupation of land which was recovered in an action of ejectment. It would be an extraordinary thing if the plaintiff could recover profits for lands he himself was in the possession of at the time, and received the profits.

It appears that there are several tenants on the land. The plaintiff can only recover the profits according to the possession of each tenant, in an action brought against them.

Defendant's attorney then stated that there were three separate actions against different persons for the mesne profits arising from the same land, and prayed the court to direct the jury that the defendant in this action, was only answerable for profits made by him during his possession.

Hollingsworth, Shaaff, Buchanan and Montgomery, for the plaintiff, objected that defendant could not set up the possession of any other person to defeat plaintiff's recovery, and that defendant is estopped to deny the will of the plaintiff from the time of the demise in the declaration in ejectment: *Run. Eject.* 156, 157; 2 *Burr.* 668.

Johnson, for the defendant, urged that the recovery in ejectment was not conclusive as to the actual possession, but only as to the right of possession, and that if defendant could prove third persons to have been in the occupation of the premises at any time, plaintiff could not recover of the defendant profits accruing during that time.

CHASE, C. J. It appears to the court that an action of ejectment was brought by the lessee of the present plaintiff against the present defendant, to which he appeared and made defense. There has been a recovery against him, and a writ of possession executed to restore the possession to the plaintiff. This action is brought to recover the mesne profits during the time the defendant remained in possession. If the plaintiff can prove his title accrued before the time of the demise in the action of ejectment, and that the defendant had been longer in possession, he may recover antecedent profits. But in such case the defendant is at liberty to controvert this title. But from the time of the demise until the plaintiff was put into possession under the *habere facias possessionem*, the defendant is account-

able for the profits. If another person enters into possession during the time the ejectment is depending, the defendant is still answerable, for it is to be supposed the entry is with the consent of the defendant. But if the defendant can prove the plaintiff himself received the profits, he is then not answerable for the profits so received by the plaintiff.

Verdict for plaintiff for three hundred dollars damages

CASES
IN THE
COURT OF APPEALS
OF
VIRGINIA.

AUSTIN v. RICHARDSON.

[3 CALL, 201.]

ALLEGATION OF NOTICE UNNECESSARY.—Where a party agreed with another that if the latter would take the bond of a third party in payment of a debt, the former should see the money paid; it is not necessary, in an action on the agreement, the bond not having been paid, to aver notice of the non-payment by the maker of the bond.

INSTRUCTION TO JURY.—The court may properly instruct the jury on the legal effect of a certain instrument, without violating the rule that an instruction shall not be given on the weight of evidence.

ACTION on the case brought by Richardson, executor of Richardson, against Austin. One Winston was indebted to the plaintiff's testator in a certain sum, and offered in payment a bond executed by Imlay to Ewing, and by him assigned to Read, who assigned to Austin, and he to the said Winston; but the testator refused to accept it in payment. However, in consequence of an understanding between the testator and the defendant that if the former would accept the bond in payment of Winston's debt, and should convey to Winston a tract of land sold by the testator to Winston, he, Austin, would be responsible to the testator for the amount of the bond, and would see the money paid. The declaration averred that the testator did perform the said agreement in all things on his part to be performed; that he conveyed the land to Winston, from whom he received the said bond in discharge of the debt as aforesaid; and had used all due means within his power to obtain payment from the obligor, but had not been able to succeed; and the defendant, though often required, had not performed the

agreement on his part, but had refused. The defendant pleaded *non assumpsit*.

Upon the trial, the defendant filed a bill of exceptions, which stated that the plaintiff, having proved the *assumpsit* laid in the declaration, produced a deed of bargain and sale from the testator to Winston, for the land, and a subsequent mortgage thereof from Winston to the defendant, to secure the payment of two hundred and fifty pounds, said therein to have been paid by the defendant to the testator; that he also proved by Winston that the mortgage was discharged, as well as Imlay's bond, by the sum mentioned in said mortgage. The bill further stated that the defendant asked the court to instruct the jury that the said deed of bargain and sale was not such a one as the plaintiff should produce, under the agreement and averments stated in the declaration; but the court refused, and informed the jury that the said deed of bargain and sale was sufficient, in law, to satisfy the averments.

Verdict and judgment were for the plaintiff, from which Austin appealed.

Duval and Randolph, for appellant, argued that notice to Austin that the money could not be obtained from Imlay, ought to have been averred; for Austin was but a mere indorser, and therefore timely notice ought to have been stated in the declaration, and proved upon the trial: 2 Morg. Ess. 152; *Chichester v. Vass*, 1 Call, 83 (1 Am. Dec. 509). But considering Austin merely as a security, it was absolutely necessary for the plaintiff to have laid a special notice; because the defendant was chargeable on a collateral matter, and not on a mere debt: 1 Esp. N. P. 130.

The declaration states a conveyance by the plaintiff in his own right, but the deed is in his capacity of executor, and there is therefore a variance. The instruction of the court that the deed supported the averments was erroneous: *Keel v. Herbert*, 1 Wash. 203.

Wickham, for the respondent, denied that an averment of notice was necessary. The assignee is indeed bound to use due diligence to recover, but not to give notice to the assignor: *Lee v. Love*, 1 Call, 497; *Mackie v. Davis*, 2 Wash. 219 (1 Am. Dec. 482.) Besides there is an express averment that the plaintiff had performed all things on his part, which includes notice, if necessary. There is no variance between the evidence and declaration; for although the declaration does not state the deed to have been by him as executor, yet it is substantially the same

thing; for he executed the deed, and it was his act. The instruction was not upon the whole evidence but merely that the deed corresponded with the averments in the declaration.

LYONS, J. The first exception taken by the counsel for the appellant is, that there is no averment of notice to the defendant, and that due diligence had been used to obtain payment from Imlay. But the court is of opinion that there was no necessity for such an averment; for the defendant undertook to see the money paid, and, of course, it was his business to look to the performance himself, without any notice from the plaintiff. For the difference is, where the party cannot perform the thing without receiving notice from the person to whom it is to be performed, and where he may perform it without such notice from the other side. In the first case, a special notice and demand is necessary, but not in the other; and that is the whole amount of the cases cited from *Espinasse* by the appellant's counsel. But in the present case, the defendant might have performed his undertaking without notice from the plaintiff; he might have consulted the records and seen the deed; he might have ascertained whether the money had been paid by Imlay; and if not, he might have had it done without notice or other act on the part of the plaintiff. Of course, as he had entered into an express undertaking, if he failed to perform it, a general allegation of the demand and refusal was sufficient without stating a special notice or particular request. The case of *Chichester v. Vass*, 1 Call, 83 (1 Am. Dec. 509), has no influence on the case, as was supposed by the appellant's counsel; for that case did not turn upon the notice, but upon the omission to aver a gift to the other daughters; which being the very gist of the action, the court thought that there could be no recovery without an express statement of the fact; but here notice was not the gist of the action. The plaintiff had only to convey the land, and the defendant was bound to see the money paid; therefore notice that he should do so was wholly unnecessary.

With respect to the opinion given by the district court, relative to the deed, we think there is no just ground of exception on that account. For it was the defendant who moved for the instruction; and the court, in effect, only gave their opinion that it was in substance conformable to the declaration, and not that the plaintiff was entitled to recover upon the evidence offered. So that the opinion merely served as an inducement to the other evidence *de hors* the deed, which was to form a component part of the plaintiff's right to recover. It is there-

fore not like the case of *Keel v. Herbert*, where there was an express declaration to the jury upon the whole evidence; for in the present case, it was a construction of papers, and the opinion confined to a single point, without any attempt to prescribe the verdict which the jury were to find. The court is, therefore, unanimously of opinion that there is no error in the judgment, and that it ought to be affirmed.

Judgment affirmed.

This case is cited in *Brooke v. Young*, 3 Rand. 112, on the point of an instruction to the jury. On the subject of notice, it is cited in the sixteenth American edition of *Chitty on Pleading*, p. 337.

BLANE v. PROUDFIT.

[3 CALL, 207.]

POWER OF AGENT TO BIND PRINCIPAL.—A merchant abroad writes to his correspondent here to buy grain on his account, and draw bills on him for the amount; the agent can draw bills only for this specific purpose; and if a third person sells grain to the agent, without dealing with him in that capacity, or to the principal, he cannot recover of the principal on bills drawn on the principal by the agent, at the time of sale, for the purchase money.

GENERAL RULE AS TO PRINCIPAL'S LIABILITY.—The general rule is that, to charge the principal, the agency must be proved to be universal, or the dealing must be within the agent's explicit powers.

BILL filed by Proudfit in the high court of chancery, stating that Hunter was employed by Blane, of London, to purchase grain in Virginia, and to draw bills on him for payment; that plaintiff, knowing of this authority, sold Hunter ten thousand bushels of corn, for one thousand five hundred and eighty-eight pounds, in bills to be drawn by Hunter, and indorsed by Patten and Dalrymple, also agents of Blane; that after nine thousand four hundred bushels had been delivered on board the *Scipio*, one of Blane's vessels, Patten and Dalrymple refused to indorse, but assured plaintiff of Hunter's authority, and showed plaintiff a copy of his orders; that plaintiff forwarded the bills to London, where they were protested.

Patten's answer admits the refusal to indorse, but denies having assured plaintiff of Hunter's authority, and avers that, on the contrary, they said that they, Patten and Dalrymple, thought he was exceeding his authority; that they showed to plaintiff a copy of their orders from Blane, which only authorized them to

draw upon actual shipments made, and that they told plaintiff Hunter's instructions were of the same nature.

Blane's answer states that Hunter and others being indebted to him, he chartered vessels and sent them to Virginia to be laden with corn for Europe, if they should think proper to undertake the shipments, and gave instructions by letters of the twentieth and twenty-third November, 1789; that plaintiff should have demanded the letter of the twentieth if he meant to contract with Hunter in consequence of that of the twenty-third; denies that he employed Hunter to purchase grain on his account, or draw bills on him unless warranted to do so by placing funds in his hand; insists that he was only obliged to receive consignments of grain sent him by Hunter; that the Brinkley was the only ship Hunter was authorized to load; that the latter's instructions were limited to particular objects, and that defendant declined receiving the cargo of the Scipio.

Depositions were read showing the sale and delivery of the corn as stated in the bill, the refusal to indorse, and the assignment of the bill of lading to plaintiff as security. It also appeared from the depositions that Blane chartered the ship, insured her cargo to Ferrol, Spain, but afterward, on account of the poor market there, ordered the vessel to London; and that at the time of the non-acceptance of the bills, Blane gave as a reason therefor, that he might not receive remittances from Ferrol to pay them.

There were given in evidence various instruments: The bills, dated sixth of May, 1790, drawn by Hunter on Blane, at sixty days' sight, in favor of the plaintiff. A copy of the charter-party entered into by Blane with the owner, for nine months or more, no particular voyage being described. The letters of the twentieth and twenty-third November, 1789, from Blane to Hunter, containing instructions to purchase. The letter from same to same, dated twenty-seventh November, 1789, relative to the Brinkley, and telling Hunter to repair at his, Blane's, expense. A letter of December 24, 1790, from Blane to Hunter, reminding him of some balances due, and reproaching him for having exceeded his authority, which was confined to the Brinkley's cargo; that his drafts had not been accepted for want of funds to his credit; that the Scipio had been loaded under circumstances which rendered it optional in Blane to take it or not; but that previous to his knowledge of these circumstances he had insured the cargo, the premiums of which not having been reimbursed, he had placed to Hunter's debit. A letter from

Proudfit to Hunter, of sixteenth March, 1790, as follows: "I have for sale ten thousand bushels of corn, which I will deliver to you at Port Royal, on board any vessel you may send by the twentieth April next, at fifteen shillings and sixpence sterling per barrel (of five bushels). Should your vessel not be there by that time, the corn is to be received by your friend, and the bills given me, which are to be upon London at sixty days, indorsed by Patten & Dalrymple." A letter of the same date in answer, agreeing to take the corn at fifteen shillings and sixpence, payable in bills on London at sixty days' sight. Letter of May 16, 1790, from Proudfit to Hunter, complaining of his having directed Dalrymple to receive the bills of lading for the corn, as it was in consequence of his promising to indorse the bills of lading that I accepted your bills without the indorser's promise; and requesting that he will come to Fredericksburg to see about it, as the bills of lading must be indorsed by Hunter to Proudfit.

A witness testified that he was present when the contract between Hunter and Proudfit was entered into, and that Blane's name was not mentioned, nor was he nor any other person named as in any way interested in the purchase, or responsible for the payment. The court of chancery decreed in favor of the plaintiff; whereupon Blane appealed.

Randolph and Wickham, for the appellant, contended that Hunter exceeded his authority, but relied principally on the circumstance that Proudfit contracted with Hunter alone; that the correspondence with Hunter is in his own name and not as agent; that the bills were not drawn on account of the agency: *Hopkins v. Blane*, 1 Call, 377; Pow. on Con. 118.

Nicholas, for the appellee, urged that Hunter's powers were of the most extensive kind, that he was a general agent: *Hooe v. Oxley*, 1 Wash. 19 (1 Am. Dec. 425). There was no evidence to show that the contract was on Hunter's own account.

By Court, LYONS, J. In the present case the defendant might, with safety, perhaps, have demurred to the plaintiff's bill. For although it charges that the bills of exchange were taken upon the credit of Blane, yet that is consistent with the other facts stated in it; such as the requisition that the bills should be indorsed by Patten and Dalrymple, and when that could not be obtained, taking of an assignment of the bills of lading. These circumstances prove that the bills were neither drawn nor taken upon the credit of Blane, but that the plaintiff looked else-

where for security. Therefore, upon his own showing, it is probable that the bill could not have withstood a demurrer.

Be that as it may, however, the case is clearly in favor of the defendant upon the testimony; for the plaintiff does not prove that he ever saw or heard of Hunter's powers before he sold the corn to him. But if he had, those powers did not authorize Hunter to draw the bills in question. For it does not appear that the contract was upon the account of Blane; so far from it, his name is not even mentioned in the agreement, but the stipulation is for bills on London, generally to be indorsed by Patten and Dalrymple, without mentioning on whom they were to be drawn. A circumstance which plainly shows that Blane was not considered as the person on whose account the contract was made; otherwise it is not conceivable why his name was omitted.

This, however, is not all. There are other circumstances which have considerable weight in determining that it was a transaction between Hunter and the plaintiff, upon the credit of Hunter only. For it appears that when Patten and Dalrymple refused to indorse, the plaintiff had it in contemplation to stop the delivery of the corn until the bill of lading was assigned to him; which certainly would not have happened had he relied upon the credit of Blane. Besides, that charge is exploded by other circumstances; for in his letter of the twenty-third of April, 1790, he intimates that the bills of others indorsed by Hunter would be received; which shows that his confidence was in Hunter himself; and therefore, after the bills were returned protested, he is found inquiring how he could secure himself, as Hunter's affairs were deranged. The circumstances plainly prove that the credit was not given to Blane, but to Hunter; and that the plaintiff relied on other securities for indemnity in case his confidence in Hunter should turn out to have been misplaced.

But the case of *Hoe v. Oxley*, 1 Wash. 19 (1 Am. Dec. 425,) is relied upon by the counsel for the appellee as establishing Blane's responsibility. That case carried the principle far enough, and we are not disposed to push it any further. It is sufficient, therefore, to remark that the analogy between the two cases is not so great as the counsel supposes; for there the correspondence held out an idea that Ponsonby's bills would be honored to any extent, whereas nothing of the kind appears in the present case. Of course, the authority of that case is not so decisive as the counsel for the appellee represents.

The general rule is, that to charge the principal, the agency

must be proved to be universal, or the power must be explicitly given. For, if the power is limited to a particular object, it is a mere relation between merchant and factor; and the latter must act within the pale of his authority, or the principal is not bound: *Hopkins v. Blane*, 1 Call, 361. But here the agency is not pretended to be universal, and the power was limited to a particular object, which not being attended to, the correspondent could create no responsibility in the principal. A doctrine contrary to this would be ruinous to commerce. For then if a merchant in one country ordered goods from another, he would be liable to the manufacturers and shop-keepers who furnished them, although he had no communication with them, and there was no confidence existing or intended to exist between them and him, his engagement being confined to his own correspondent personally, without the least thought of extending it further.

Upon the whole, the transactions between the plaintiff and Hunter appear to have been of a private nature, and founded on the credit of the latter only. Of course, there is no ground for charging Blane; and, therefore, the decree is to be reversed, and the bill dismissed with costs.

READ v. PAYNE.

[3 CALL, 225.]

PAROL EVIDENCE NOT ADMISSIBLE TO EXPLAIN TESTATOR'S INTENTION.—When a will is exhibited for probate, if a witness give additional testimony of parol declarations by the testator, for the purpose of explaining the written will, such testimony being without any notice thereof to the parties interested in the estate, ought not to be recorded, nor afterward read in evidence in any controversy concerning the will without consent of parties.

RESIDUARY DEVISE.—A testator bequeathed to his wife certain slaves, during her natural life, and after specific devises of lands and slaves to his two sons, devised as follows: "All the rest of my estate I leave at the time of my death, I desire may be equally divided between my beloved wife and my dear sons, and their heirs forever." This residuary clause vested in the wife and sons equally the reversion in the slaves given to her for life; and, therefore, on her remarriage, her husband became entitled absolutely to one-third of those slaves, and their increase.

APPEAL from the court of chancery. It appeared that Jesse Payne, by his will, after some specific devises of land, bequeathed as follows: "I give and bequeath unto my beloved

wife Frances Payne, during her natural life, the following eight negroes," naming them; he gave seventeen negroes to his two sons, and then directed: "All the rest of my estate I leave at the time of my death, I desire may be equally divided between my beloved wife, Frances Payne, and my dear sons, George Morton Payne and Richard Baylor Payne, and their heirs forever." At the time of proving the will, one of the witnesses deposed that the testator desired that the eight negroes left to his widow for her life, and their increase, should be equally divided between his two sons after the decease of his widow; that witness drew the will, and the reason this disposition was not inserted, was that the testator appeared to be losing his senses, and time would not permit.

The question was, whether the remainder in the eight negroes, after the wife's death, was part of the residuum, or belonged to the sons, in exclusion of her representatives. The court of chancery decided in favor of the sons, and Read, who had married the widow, appealed.

Randolph, for the appellant, urged that the residuary clause passed the reversion: *Cole v. Clayborn*, 1 Wash. 262; *Kennon v. McRoberts*, 1 Wash. 96 (1 Am. Dec. 428); that estate is a *nomen generalissimum*, and passes the whole interest: 19 Vin. Ab. 222; Co. Litt. 345. That the tenant for life was one of the devisees, makes no difference. Moreover, the testimony of the subscribing witness is inadmissible, as it is an *ex parte* affidavit, and as it will destroy the effect of the words of the will: Pow. on Dev. 518.

Nicholas, contended, on behalf of the appellee, that the whole context of the will showed the testator intended that his wife should have but a life estate, and his children the residue. The word estate in this case was intended to supply a clause accidentally omitted; that it did not necessarily include the interest, but might be confined to the subject of the devisee.

By Court. The court is of opinion that the information or additional testimony of Joseph Robinson, who was a witness to the will of Jesse Payne, the testator in the bill named, given at the time he proved the said will in the county court of Goochland, without any notice thereof to the parties interested in the estate of the testator, in order to prove the desires of the testator, and to explain the written will exhibited in court for proof only, ought not to have been admitted or registered with the probate of the said testament, or read in evidence in this

cause, without the consent of the parties, and this court being of opinion that the appellant is under the residuary devise in the said will entitled, in right of his late wife Frances, who was widow and one of the residuary legatees of the testator, Jesse Payne, to one-third part of the eight slaves devised by the will of the said Jesse to the said Frances for life, and one-third of their increase, with their profits since the death of the said Frances; and that so much of the decree aforesaid as directs the appellant to deliver up to the appellee more than two-thirds of the said slaves, with their increase, and to account for the profits, is erroneous; doth decree and order that so much of the said decree as is herein before stated to be erroneous, be reversed and annulled, and that the residue thereof be affirmed.

ROSS v. OVERTON.

[3 CALL, 309.]

DATE OF ARBITRATION BOND.—A variance between the date of the bond declared on and that recited in the award is not fatal, if in other respects they agree; thus, if the bond declared on have the month blank and the award recites the month, it will not be fatal.

COVENANTS IN LEASE.—Where a mill and premises were leased, and the lessee covenanted to leave it in repair, and the mill during the lease is carried off by ice, it was held that the lessee was bound to pay the rent, and to perform the covenants including the covenant to repair.

AWARD, SETTING ASIDE.—The court will not interfere to set aside an award, on the ground of the arbitrators having mistaken the law in a doubtful case.

RULE AS TO GRANTING A NEW TRIAL.—A new trial, because the verdict is contrary to evidence, ought to be granted only in a case of plain deviation, and not in a doubtful one, merely because the court, if on the jury, would have given a different verdict.

ACTION of debt on a bond for six thousand pounds, dated twenty-fifth day of —, 1784, brought by Overton against Ross; which bond was conditioned for the performance of an award to be made by three arbitrators, concerning the payment of the rent and the making improvements on a tract of land, merchant mill and fishery of the plaintiff, leased to Ross. From the award as set forth in the declaration it appeared, that Ross, after accepting the lease, covenanted as follows: that he will make the improvements hereinafter named, to wit, a convenient bakehouse, two stories high, with three ovens; a miller's house, thirty-two by sixteen, one story high, with two chimneys of

stone or brick, lathed and plastered, and finished in a workman-like manner; a kitchen, sixteen by sixteen, with stone or brick chimney; a stable of convenient size, and also a cooper's shop; that he will open the canal, extend and improve it, so as to admit a plentiful supply of water, as far as the situation and plan of the said mill will admit with convenience; to pay taxes, and to deliver the said mill, together with the improvements aforesaid, at the expiration of the said term of seven years in proper tenantable repair. It further appeared, that in January, 1784, by an extraordinary and unexpected movement of the ice, the mill-house was entirely demolished, Ross not being able to prevent the same. The arbitrators thereupon awarded and determined that Ross should pay the rents reserved in the lease, notwithstanding the accident caused by the ice and that he should comply with and perform the other covenants contained in the said lease. The bond was recited in the award as dated, twenty-second May, 1784.

The defendant pleaded, conditions performed, and no award; and issues were joined. Verdict was found for the plaintiffs upon both issues, for three thousand five hundred and thirty pounds; whereupon defendant moved in arrest of judgment: 1. Because no date to the writing obligatory in the proceedings mentioned is set forth in the declaration, the time in which it was executed not being therein stated; 2. Because the award appeared to be made upon a different obligation from the one declared on; 3. Because the breach of the condition of said obligation is not set forth with sufficient certainty.

The district court entered judgment for the plaintiff, and Ross appealed.

Hay, Duval, Warden and Wickham, for the appellant. There is a variance between the bond declared on, and the one recited in the award; this is fatal: *Turner v. Moffett*, 2 Wash. 70. The injury to the premises arose from inevitable accident; the tenant is therefore excused: *Doe v. Sandham*, 1 T. R. 708; *Forward v. Pittard*, 1 T. R. 28; *Stent v. Bailey*, 2 Eq. Cas. Ab. The arbitrators were mistaken in their inference from the facts, and the court may relieve against it: *Jerdone v. Holt*, decided in this court in December, 1790; *Pleasants v. Ross*, 1 Wash. 158 (1 Am. Dec. 449).

Call, Nicholas and Randolph, contended on behalf of the appellee, that the variance of the date in the bond did not vitiate; because the defendant showed no other bond; because the sub-

stance of the bond and award agree, which proves reference had to this bond: *Deane v. Cunliffe*, April term, 1797; because the arbitrators have found the true date of the bond and made that certain which was uncertain: *Cromwell v. Grumeden*, 1 Ld. Raym. 335; *Goddard's case*, 2 Co. 4; 1 Nels. Ab. 388; because the award states that the bond was dated, not that it bore date, on twenty-second May, 1784; because the variance should have been pleaded; because it has been expressly decided not to be fatal: *Style*, 87; *Allen*, 87; 1 Vent. 184. They further argued that, notwithstanding the act of God, wherever there is an express covenant to pay rents, make repairs or put in tenantable order, the tenant is bound to perform: *Paradine v. Jane*, *Allen*, 27; *Monk v. Cooper*, 2 Str. 763; *Shubrick v. Salmond*, 3 Burr. 1638, 1640; *Balfour v. Wesson*, 1 T. R. 310.

By Court, ROANE, J. In this case two objections have been made to the judgment of the district court: 1. That there is a variance between the award and the bond of submission, stated in the declaration, the former referring to a bond dated the twenty-second of May, 1784, and the declaration stating the bond in suit to be dated the twenty-fifth of —, 1784.

In support of this objection, the counsel principally relied on the case of *Turner v. Moffett* in this court, reported in 2 Wash. 71. But that case does not apply; since the variance was apparent on record, against which no averment is admissible; and it was truly observed by the attorney-general, that that case was distinguishable from the present; which, being a bond for the submission, was a matter *in pais*, and the supposed variance might be corrected by averment. The declaration states that the defendant on the twenty-fifth day of —, 1784, by obligation, the date whereof is the same day and year, bound himself to the plaintiffs. In the breaches assigned annexed to the declaration, after reciting the lease to the defendant, and its essential covenants on his part, and that differences had arisen, which the parties had mutually agreed to refer to arbitration, the plaintiffs aver that they entered into a bond similar to that entered into by the defendant, to abide by the award; and that the defendant, on the same day, to wit, the day of —, 1784, executed the bond in the declaration. It is obvious from the award that the arbitrators had before them, not Ross's bond, but that entered into by the plaintiffs, which they say is dated the twenty-second of May, 1784. Without going over the several cases cited, the rule laid down in 1 Ld. Raym. 335, seems to have run through them all; that is, that if a bond had either

none or an impossible date, the plaintiff may aver any day which he can prove the bond to have been delivered on. The present case is that of no date to the bond; (for the counsel's curious criticism, referring the twenty-fifth day of something to the day of the year, was calculated only to occasion the mirth it produced). We consider that, as well as the blank date averment, to be no date; and of course there is no variance between that and the true date mentioned in the award; in every other thing, in parties, controversy and arbitrators, they agree. And on this point there is no error in the judgment of the district court.

The second objection is to the award itself. On this point it was argued by Mr. Wickham, that under the covenant for quiet enjoyment, the Overtons were the insurers of the property against all accidents; but surely that covenant, which does not differ essentially from others of a like kind, only obliges the lessor to defend the enjoyment of the lessee against legal claims, and not against a separation of continuity, robbers, thieves, trespasses, or the ice, as was said by the counsel. But it was argued that where it is apparent in the award that the arbitrators decided upon principles in which they were mistaken, either in law or fact, the court will set aside the award; and that they were so upon the present case; since it being stated that the mill-house was entirely demolished by an extraordinary and unexpected movement of the ice, which Ross had it not in his power to prevent; they mistook the law, when they awarded that he should pay the rent and perform his other covenants in the lease, notwithstanding the accident.

For the sake of precedent, the court first considered how far they ought to interfere with awards upon this ground, and are of opinion that they ought not to consider themselves as an appellate court from the judgment of the arbitrators, and reverse it merely because we differ in opinion from them on a doubtful question; but ought to place ourselves in the state of a court applied to, to grant a new trial because the verdict is contrary to evidence, which ought to be granted only in case of a plain deviation, and not in a doubtful one, merely because the court, if on the jury, would have given a different verdict; since that would be to assume the province of the jury, whom the law has appointed the triers. The rational distinction between plain and doubtful cases is observed in the books which justify the courts in setting aside awards for mistaken principles. That this was at least a doubtful question is evinced not

only by the number of counsel employed to discuss it, but from the English decisions on the subject. And on this ground we think the district court did not err on this second point; at the same time observing, that stating it as a doubtful case cannot be complained of by the appellant, since, on the merits, it is our present opinion that the arbitrators did not mistake the law. The judgment is therefore affirmed with costs.

This case has been frequently cited as a leading case in the Virginia courts. Thus in *Pollock v. Sutherland*, 25 Gratt. 95, it was cited to show that every presumption is to be made in favor of an award. It is regarded as enunciating a sound general rule as to when a court should interfere with a verdict. On this point it is cited in *Brown v. Handley*, 7 Leigh, 194; *Randolph v. Hill*, Id. 388; *Slaughter v. Tatt*, 12 Id. 160, where it is termed a leading case: *Taliaferro v. Franklin*, 1 Gratt. 340; *Vaiden's case*, 12 Id. 728; *Read's case*, 22 Id. 942.

In regard to the covenants to repair and pay rent, it is thus referred to in the decision in *Scott v. Scott*, 18 Gratt. 166: "The rule [as to covenants to pay in case of destruction] has stood the test of time and innovation in England, and remains, I believe, to this day the law of that country. However it may have been changed and modified by adjudication or legislation in some of our sister states, if such be the fact, it has been and yet is the settled and approved law of our state. In *Ross v. Overton*, the lessee of a mill having covenanted in addition to the rents reserved to make certain improvements and deliver the mill with such improvements at the end of his term in proper tenantable repairs, and the mill during the lease having been destroyed by the ice, three arbitrators, to whom the matter was referred, awarded that the lessee should pay the rent, notwithstanding the destruction of the mill, and should perform the other covenants contained in the lease, and the court of appeals expressed an opinion that the arbitrators did not mistake the law." On this latter point it is cited in *Maggort v. Hausbarger*, 8 Leigh, 536.

This case will be instructive, taken in connection with *Pollard v. Shaffer*, 1 Am. Dec. 239, where a similar point was decided.

YOUNG v. GREGORIE.

[3 CALL, 446.]

ALLEGATION OF THE WANT OF PROBABLE CAUSE.—In an action for a malicious prosecution the declaration must aver the want of probable cause, and even the allegation of the want of legal or justifiable cause will not be sufficient, and the declaration is fatal even after verdict.

PROCEEDINGS IN A FOREIGN COUNTRY, HOW PROVED.—The proceedings in a civil suit in a foreign country may be proved by depositions and testimony *dehors* the proceedings, as for instance the defendant's own letters.

APPEAL from the district court. Young brought an action in

the borough court of Norfolk against defendants for levying an attachment on plaintiff's property in France without cause, all the parties being inhabitants of this country. The declaration stated that the defendants at Dunkirk within the jurisdiction of the court of the borough, did, maliciously and without any legal or justifiable cause, attach, or arrest, or caused to be attached or arrested, fifty hogsheads of tobacco and caused the same to be detained to plaintiff's injury in the sum of two thousand pounds. Plea, not guilty, and issue.

At the trial the plaintiff did not produce any copy of the attachment and proceedings under it, but offered depositions and letters to prove it. These were admitted against defendants' objection, and verdict was rendered for the plaintiff. The defendants then appealed to the district court, where the judgment was reversed for the reason that the "borough court gave it as their opinion that the evidence in the bill of exceptions mentioned was proper to go to the jury; whereas it was improper, being hearsay evidence, except what was derived from the appellant's own letter; and because the attachment in the proceedings mentioned, or an authenticated copy thereof, was the best evidence and ought to have been produced." From this judgment of reversal, Young took a writ of *superedeas* to this court.

Wickham, for the appellant. A copy of the record was not necessary; the proceedings being in a foreign country, the plaintiff was at liberty to prove them by other means: *Walker v. Witter*, Doug. 1. The matter of the suit was actionable; for, though done in a foreign country, the injury to plaintiff's reputation has reached here: *Schwartz v. Thomas*, 2 Wash. 167 (1 Am. Dec. 479), case was the proper form of action, as the word attach necessarily implies a seizure by legal process. If opposing counsel contend that the declaration did not state without probable cause, and that the prosecution was at end, it may be answered that the words justifiable cause are sufficient, as they involve a probable cause; and that in either case the omission is cured by the verdict: 2 Vin. Ab. 30, 35; 10 Mod. 145, 210; Esp. N. P. 279, 280.

Hay, for the appellee, urged that trespass was the proper action, as the declaration does not show a taking on legal process; that it does not appear that the attachment was at an end: *Waterer v. Freeman*, Hob. 267; *Morgan v. Hughes*, 2 T. R. 231; *Fisher v. Bristow*, Doug. 215; *Robins v. Robins*, Salk. 15. The

declaration does not state without probable cause, which is necessary to support an action for malicious prosecution: *Ellis v. Thilman*, 3 Call, 3; and the verdict will not cure the omission: *Tarleton v. Fisher*, Doug. 683; *Winston v. Francisco*, 2 Wash. 187.

ROANE, J. In this case I am compelled to yield my impressions relative to the real justice of the appellant's cause to the established principles of the law as settled by successive and long existing decisions.

It is an action on the case for maliciously and without a justifiable cause, arresting or attaching the plaintiff's goods at Dunkirk, in France. Tribunals of justice being instituted for the convenience and benefit of the people, it is a claim of right to prosecute a civil action or proceeding, whatsoever the ultimate decision on it may be. It then only becomes culpable and actionable when the party has instituted such proceedings from a corrupt motive and without any ground or cause therefor. Such is the general principle. The decisions upon this question have settled the law to be, that there must be an averment in the declaration of both malice and the want of a probable cause. Without the first, the motive is not corrupt, however mistaken the party suing may be. And where there is a probable cause for suing, the ingredient of malice cannot convert the act of suing into a culpable offense. There is no position of the law more settled than this, and the existence of the one and the want of the other must be expressly averred, or supplied by equipollent expressions. The word justifiable is not synonymous with probable. The latter refers to a standard within the reach of the person at the time and determining the purity of his motives. The former refers to another criterion within his reach, and carrying with it no certain *datum*, from which we can decide upon the corruptness or purity of the motive. I quote no particular cases justifying this result, but it has not been delivered without an attention to them. The want of a statement in the declaration that the civil proceeding was terminated, is cured by the verdict; but the averment of the want of probable cause is of the very gist of the action, and the omission of it must overthrow the plaintiff's declaration.

I, therefore, concur in the opinion with the district court, but upon a different ground. The evidence by them, supposed to be hearsay, is clearly admissible and relevant. But I give no opinion, whether we should presume the attachment to have

been in a court of record; or upon the necessity of producing a record, showing its termination. I think the judgment ought to be affirmed.

FLEMING, J., concurred with ROANE, J., and cited *Johnstone v. Sutton*, 1 T. R. 544, as to the necessity of averring want of probable cause.

CARRINGTON, J. I think the evidence was admissible to show the injury which the plaintiff had sustained, and that the attachment was commenced without cause. For, as the proceedings took place in a foreign country, it would be too rigid to insist upon copies, which, perhaps, could not have been procured. Therefore, the judgment of the district court is not sustainable upon the reasons assigned by them. But for another reason, I think it ought to be affirmed. The judgment of the borough court was certainly erroneous, on account of the insufficiency of the declaration. It is completely settled that in a suit for a malicious prosecution, it must appear that there was no probable ground for the prosecution, since the want of probable cause is the very gist of the action, and, therefore, it must be averred. This averment is not supplied in the present case by the words justifiable cause, for the latter mean no more than legal cause; and there might have been a probable, though not a legal cause. The first might depend upon appearances at the time; the last upon the real state of the case. The essential ground of the action then being omitted, the plaintiff cannot recover upon this declaration; for it has been often decided that if the gist of the action be not laid, a verdict will not cure the defect: *Rushton v. Aspinall*, 2 Doug. 679; *Winston v. Francisco*, 2 Wash. 187; *Chichester v. Vass*, 1 Call, 83, (1 Am. Dec. 509). The declaration would have been bad upon demurrer, for another reason, namely, the omission to charge that the attachment was ended: *Fisher v. Bristow*, Doug. 215. But that, perhaps, is aided by the verdict. However, the failure to lay the want of probable cause is decisive; and, therefore, I am of opinion that the judgment of both courts ought to be reversed, and the judgment entered for the defendants.

LYONS, J., was of opinion that judgment should be for the defendants, on the ground that the declaration was defective in not showing that the attachment had been determined; for until it is determined it cannot appear whether the process was or was not issued without probable cause: Bull. N. P. 12, 13; Doug. 215.

The doctrine of this case was affirmed in *Mowry v. Miller*, 3 Leigh. 608. In *Farmers' Bank v. Clark*, 4 Leigh., it is cited on this point with approval.

COMMONWEALTH v. POSEY.

[4 CALL, 109.]

HOUSE IMPORTS A DWELLING-HOUSE IN CASE OF ARSON.—In an indictment at common law for arson, it is not necessary to state that the house burnt was a dwelling-house, as this is signified by the word house; and if upon the trial it appear that it was not a house the subject of arson, it is the duty of the court to direct the jury to acquit the prisoner.

CONSTRUCTION OF STATUTE NOT TO BE DISTURBED.—Where the construction given to a statute has long been acquiesced in, it ought not to be disturbed.

INDICTMENT for arson. Posey was convicted in the general court upon an indictment, which charged that he “on the fifteenth day of July, in the year of our Lord one thousand seven hundred and eighty-seven, between the hours of ten and two in the night of the same day, with force and arms, at the parish aforesaid in the county aforesaid, two houses, to wit: a certain house of one William Clayton, there situate, and also one other certain house, to wit: the common jail and county prison in the said county of New Kent, in the parish and county aforesaid situate, feloniously, willfully and maliciously, did set fire to and the same houses then and there situate, by such firing as aforesaid, feloniously, willfully and maliciously, did burn and consume, against the peace and dignity of the commonwealth of Virginia;” and filed the following reasons in arrest of judgment:

1. That the indictment does not properly charge the house of William Clayton to be his property, or in his occupation, nor describe the said house properly, it being called a certain house of one William Clayton;

2. That the indictment blends two facts as constituting one act of arson; the one of which facts, to wit: the burning of the prison, is not felony at common law;

3. That it does not charge the property of the said prison to be in any person, or to be in the occupation of any person whatever;

4. That it does not charge the common jail and county prison to be one and the same building, or to be the jail or prison of any county;

5. That the said offense charged in the indictment, if a felony, is yet within the benefit of clergy. And further, that if

*In the fourth volume of Call's Reports cases are given which were determined by the first court of appeals, and therefore such appear here out of their chronological order.

one of them be such a house of which arson could be committed at common law, and the other not, to wit: the common jail and county prison, that then the offense not being complete, as laid in the indictment, no judgment ought to pass upon the said John Price Posey.

The general court, being in doubt, advised the cause to be taken to the court of appeals.

St. George Tucker, for the commonwealth, contended that the word house meant a dwelling-house, and was the term used in indictments: 1 Hale's P. C. 567; 1 Hawk. c. 29, s. 1; that a prison was the dwelling-house of the prisoners confined, and the burning of it felony at common law; that if the burning of the prison were not felony, yet the verdict is supported by the other act charged; that the prisoner was not entitled to the benefit of clergy, for the statutes 23 and 25 Hen. VIII, which took away that privilege, are still in force: 4 and 5 Ph. & M. c. 4; *Powtler's case*, 11 Co. 29; 1 Hale's P. C. 570; 2 Hawk. 846.

Ronald, for the prisoner.

TYLER, one of the judges of the court of admiralty. Two points arise in the cause: 1. Whether the prisoner is entitled to the benefit of clergy upon the offenses charged in the indictment; 2. Whether the indictment is sufficient. As to the first, I am of opinion that the prisoner is not entitled to the benefit of clergy. For arson was punishable with death at the common law, and although clergy was allowed by the statute *pro clero*, 25 Edw. III, c. 4, yet it was taken away by the statutes of the 23 and 25 Hen. VIII; and notwithstanding the latter was repealed for a time, by the 1 Edw. VI, it was revived *in toto* by the 6 Edw. VI. This is the sound construction of the statutes, and the decisions have all been made conformable to it. *Powtler's case*, 11 Co. 29, is clear, and Coke, Hale, Hawkins and Foster unite in opinion that the decision was correct. The point, therefore, no longer admits of discussion; for were it even less clear, it would be dangerous to decide against such long admitted precedents upon statutes of such antiquity, although upon one of our acts of assembly, I shall, whenever the case is doubtful, incline to follow the letter of the statute.

With respect to the indictment, the precedents justify it, and none to the contrary have been produced. The exception that it is not laid as the dwelling-house of Clayton has no weight with me; for if it had appeared upon the trial that it was not a house upon which arson could be committed, the jury would

have been instructed to acquit the prisoner; and the words, "a certain house of one William Clayton," are equivalent to dwelling-house, that being the primary meaning of the word house. The exception with regard to the prison has as little foundation. For the words, "common jail and county prison in the said county of New Kent," imply that it is the property which the law directs the county to provide, and that it is a dwelling-house; for it is the abode of the persons who may happen to be confined there; and it would be strange if, instead of their being under the protection of the law, the house might be burnt about their ears, and they left to perish in the flames. The rest of the exceptions are unimportant, and require no discussion.

LYONS, J. (of the general court.) None of the exceptions to the indictment had any weight with me, except those relating to the description of the houses; but I am now satisfied that it was not necessary to describe them as dwelling-houses, for house, in its highest sense, means a dwelling-house; and common jail and county prison means the house provided by the county, under the act of assembly, for the custody of persons committed by legal process. No danger arises to the prisoner from the general description, because it is the duty of the judges upon the trial to direct him to be acquitted by the jury, if the house proved is not one upon which arson could be committed.

The point relative to clergy was settled in *Powtler's case*, upward of two hundred years ago; and that resolution ought not now to be shaken, for the solemn decisions of the judges upon a statute become part of the statute: 1 Burr. 419; and the security of men's lives and property require that they should be adhered to. For precedents serve to regulate our conduct, and there is more danger to be apprehended from uncertainty than from any exposition, because, when the rule is settled men know how to conform to it; but when all is uncertain they are left in the dark and constantly liable to error. For the same offense which at one time was thought entitled to clergy, at another may be deemed capital; and thus the life or death of the citizen will be made to depend, not upon a fixed rule, but upon the opinion of the judge who may happen to try him; than which a more miserable state of things cannot be conceived: 1 Vern. 18; 3 Burr. 1730, per Wilmot, J. The authority of *Powtler's case* is therefore conclusive; and, consequently, I am of opinion that the prisoner is not entitled to clergy.

PENDLETON, President (as well of the high court of chancery as of the court of appeals). The indictment is an indictment at common law, and none of the exceptions to it are of any weight except the first, which consists of two branches, namely, that the house is not stated to be the property of Clayton; that it is not called his dwelling-house. The first is entirely groundless, for the words, "house of William Clayton," mean that it belongs to him; and the second is not much better founded. Dwelling-house is a complex term and scarcely more certain than house; for it is not confined to any particular room in the building, nor even to the same room, but it extends to all the houses belonging to the curtilage, and therefore the difficulty is as great under one description as the other. But do the authorities require that it should be called a dwelling-house? The Mirror is not very precise upon the subject; and Lord Coke is rendered equally obscure by the addition of his *vide licet*, which leaves it not very clear whether he was describing the offense itself or the form of the indictment. Hale and Hawkins, however, both drop the word "dwelling," using "house" only; and that practice is followed in the Crown Circuit Companion, without ever having been questioned, which puts an end to the difficulty as to the house of Clayton. And the description of the prison is clearer still, for the words *ex vi termini* import a dwelling-house, because it is the abode of the unfortunate men confined there. And the burning it over their heads is the more aggravated offense of the two, as confinement is no part of the punishment, but intended to prevent their escape from justice; and they ought not to receive less protection, when in the custody of the law, than if they were in their own houses. I think, therefore, that the general description of house is sufficient, especially as it is the duty of the judges upon the trial of the cause to instruct the jury what kind of house should be proved; and if that burnt is not one upon which arson can be committed, to direct them to acquit the prisoner.

The point relative to the benefit of clergy was determined two hundred years ago; and appears to me to have been properly decided. A short review of the statutes upon the subject will prove this. That of the 23 Hen. VIII, took clergy from those only who were convicted by verdict; but the 25 Hen. VIII extended it to outlaws, mutes and fugitives. This, however, was altered, probably through mistake by statute, 1 Edw. VI, which restored clergy to arson; but the latter was in effect repealed, and the 23 and 25 Hen. VIII, revived by the 5 and

6 Edw. VI, which reciting the 25 Hen. VIII and 1 Edw. VI, and taking notice of a particular kind of fugitives, adds that "all and every article, clause and sentence contained in the same, touching clergy, shall, touching such offense, stand in full strength and virtue." The words touching such offenders, in the preceding member of the sentence, related to the fugitives; but the words, such offenses, in this must have relation to the offenses generally enumerated in the recital contained in the statute; and takes clergy from them as being within the same mischief. This construction gives full effect to all the words in the statute; but without it, the words "article, clause and sentence," would be superfluous. The parliamentary construction in the 4 and 5 Ph. & M. is agreeable to that view of the subject, and strengthens the precedent of *Powder's case*, which I am unwilling to disturb for the reasons given by Judge Lyons. So far from it, that if I had any doubts upon the construction myself, I should most cordially unite with the judges who consider themselves bound by decision. I am therefore of opinion that the exceptions to the indictment are groundless, and that the law is, that benefit of clergy is taken from the prisoner.

HENRY, J., of the court of admiralty, MEDGER, FLEMING, JJ., and CARRINGTON, C. J., of the general court, and BLAIR, J., of the high court of chancery, concurred.

TAKEWELL, J., of the general court, and WYTHE, J., of the high court of chancery, dissented.

Motion in arrest of judgment denied, and prisoner refused the benefit of clergy.

WHITE v. JONES.

[4 CALL, 263.]

JURISDICTION OF LAW AND EQUITY IN FRAUD.—Courts of equity and courts of law have concurrent jurisdiction in cases of fraud.

AT LAW PATENT VOID FOR FRAUD.—A court of law can avoid a patent for fraud, but in such case the remedy is more effectual in a court of equity, which, upon a consideration of all the circumstances, can establish more complete justice between the parties than a court of common law.

APPEAL from the high court of chancery. On the ninth of March, 1780, Elisha White filed his bill in the county court of Charlotte, stating: That in 1762 he purchased four hundred and

twenty-six acres of land of Henry Hatcher. Afterward plaintiff learned that Wood Jones had obtained an order of council for two thousand acres, and in his survey therefor, included the tract of four hundred and twenty-six acres, although the surveyor's books showed that Hatcher had, four years prior to the granting of Jones's order, surveyed said tract of four hundred and twenty-six acres, but had not obtained the patent for it until the seventeenth of August, 1756. This delay was caused by a dispute between the locators of land and the governor, relative to the latter's claim of a pistole for signing the patents, and occasioned the loss of the four hundred and twenty-six acres for non-payment of quit-rents, and the failure to seat and cultivate. In consequence of this, plaintiff petitioned for it as lapsed land, and by consent, a patent was issued to him August 15, 1764. But pending these proceedings, Jones fraudulently paid the pistole to the governor, and obtained a patent for the two thousand acres, including those in question.

Jones afterward dying, the suit was revived against his heir, who answered to the bill; that Wood Jones's survey was made before the purchase from Hatcher; that plaintiff had instituted several suits against Wood Jones for this land, and failed in all of them; that Jones was not guilty of any fraud in obtaining the patent, but that Hatcher had forfeited any rights he may have had, by not submitting to the law, and that a court of chancery had no jurisdiction.

There were given in evidence: 1. A copy of Hatcher's survey, dated November 6, 1740, of five hundred and thirty acres, which did not state that it was made under any order of council, or other public act; 2. A copy of Wood Jones's order of council for two thousand acres, in the following words: "At a council held May 6, 1743, leave was given to Wood Jones to survey and obtain a patent for two thousand acres of land in Amelia county, on Turkey branch, a branch of Cub creek, beginning at a marked oak, and running up and down both sides the said creek and branch. And at a council held May 3, 1744, a former order obtained by Wood Jones, was renewed for two thousand acres in Brunswick, lying on Turkey branch, etc. John Blair, C. C. council." Hatcher's patent, dated August 16, 1756; 4. The patent, dated August 15, 1764, to Elisha White, reciting that to Hatcher, the lapse by non-payment of quit-rents and failure to improve, and the bringing of a suit by White, and the obtaining a grant for the same.

The county court, on the fourth of May, 1789, ordered Jones

to convey the four hundred and twenty-six acres to White, and after the execution of the *habere facias possessionem*, Jones appealed to the high court of chancery, where, on the twelfth of May, 1791, the following decree was rendered:

The court is of opinion that the appellee's title, if any he hath, to the land in controversy must be supported on the foundation that the grant to Henry Hatcher operated retroactively, giving to his title like vigor, as if the consummation thereof by the grant had been contemporaneous with the commencement which preceded the commencement of the appellant's right; or, on this other foundation, that the grant to Wood Jones was obtained surreptitiously, when the officer to whose function the transaction of that business belonged did not know part of the land comprehended in the grant to have been appropriated or claimed before by another, who, in not perfecting his title, had been in no default; or was obtained by collusion between the officers and the grantee, and upon supposition that the grant to Henry Hatcher by relation was prior in effect, although posterior in date to the other; or that the latter was fraudulent; this, so far as it tended to intercept his right, was void, and the appellee's remedy in a court of common law was proper and adequate. And this court, discerning no ground for application here, especially when so great a lapse of time had elapsed after the commencement of Hatcher's title before any one appeareth to have attempted to assert it, and the manner in which it was derived to the appellee, are remembered, is of opinion that the said decree of the court below, by which the appellee recovered the said land against the appellant, with costs, is erroneous, and, therefore, doth reverse the said decree, as it is accordingly hereby reversed, and doth adjudge, order and decree that the bill of the appellee be dismissed," and that he pay costs.

From this decree White took his appeal to this court.

Innis, attorney-general, and Warden, for the appellant, contended that the fraud on the part of Jones was manifest, and this was sufficient to give chancery jurisdiction; that White's title from Hatcher was good; and that the appeal to the high court of chancery was taken too late, after the execution of the *habere facias possessionem*.

Marshall, for the appellee, urged that White was not a *bona fide* purchaser from Hatcher, and he had notice of Jones's claim; that there was a remedy in law, even if the appellant had any right to the tract: *Chew v. Stevens*, in the old general court;

Hambleton v. Wells, 4 Call, 213, and the exception to the jurisdiction, therefore, sustained.

By Court, PENDLETON, President. It was said that, after the *habere facias possessionem* was executed, it was too late to appeal, and none could be allowed. But the practice in England proves this to be a mistake; for there, unless there be a special application for a writ of *supersedeas*, the execution is not postponed, but restitution is awarded in case of a reversal. However, it is unnecessary to inquire into the doctrine there; because the act of assembly allowing a petition of appeal bounds the right to it by the three years, limitation only.

That difficulty removed, we proceed to examine the decree. Courts of law have determined that, where patents have been surreptitiously obtained, they are void at common law, and that suits at law may be brought to set them aside. But such decisions are rare. None are recollected by us in England since the reign of Queen Elizabeth, and but two in this country, that of *Chew v. Stevens*, in the old general court, and that of *Hambleton v. Wells*, in this court. These never having been published, were necessarily known only to a very few of the profession, and, perhaps, hardly to any practicing in the country only. The remedy at law, therefore, in the present case, was doubtful, and less eligible, evidently, than a suit in equity, which warranted the application to the latter court. But, if that were not so, it has long been established that courts of law and equity have concurrent jurisdiction in cases of fraud, the allegation of which was the very gist of the present suit. Whenever a person having the elder title is postponed by fraud, a court of equity can more effectually set things to right again, and establish, upon a view of all circumstances, more complete justice between the parties, than a court of common law; and, therefore, is, in practice, the tribunal usually resorted to. The court has thought proper to notice these things, lest, by a general affirmance of the chancellor's decree in this case, a contrary doctrine might be thought to be established.

Upon the merits of the cause, however, the court is of opinion, that the appellant has made no case for relief. By the settled rules of the former government a man lost his right under a survey, unless it was returned into the secretary's office, within six months, which does not appear to have been done by Hatcher. Neither is it proved that he ever had any order of council, or other public warrant for the survey; or ever made any application for a patent, paid the quit rents, or cultivated or improved

the land; but on the contrary, a neglect of those things occasioned the petition for it by the complainant as lapsed land. Nor do the objections stop there; for the identity of the land is not proved, or that it is part of the lands comprehended in Jones's patent, without which the plaintiff could have no cause of complaint against the latter. The bill indeed suggests that the delay of performance on the part of Hatcher arose from the contest with the governor about the pistole fee; but even this is not proved, and if it had, no cause is shown, why a *caveat* was not filed to Jones's survey, which would have brought the whole controversy to an end. In short nothing appears to have been done to save Hatcher's right; and, although the case stated in the bill is probably a fair one, yet the plaintiff has not supported his allegations. The only thing, therefore, that can be done is to affirm the decree of the chancellor; which the court accordingly directs, and the following is to be the entry.

This day came the parties by their counsel, and on consideration of the records and the arguments of the counsel, although this court doth not approve of the general reasoning in the introduction to the decree of the said high court of chancery, being of opinion, that in controversies of this nature, where fraud is suggested and proved, courts of equity have competent jurisdiction, are most usually and properly resorted to and can afford ample and adequate relief; yet since the appellant hath made no proof in support of the allegations of his bill, or of any fraud, on the part of Wood Jones, father of the appellee, in obtaining his patent, this court is of opinion there is no error in the said decree; therefore it is decreed and ordered, that the same be affirmed and that the appellant pay, to the appellee, his costs by him about his defense in this behalf expended, which is ordered to be certified to the said high court of chancery.

The case of *Hambleton v. Wells*, referred to by the court, is reported in 1 Washington, 118, but more fully in 4 Call, 213, and a reference is made to it in a note to *Witherington v. McDonald*, 1 Hen. & Munf. 306. An examination of the case, and of the subsequent references to it, leads us to believe that it is very questionable, and though not expressly overruled by the Virginia courts, enough has been said regarding it to undermine its authority. The question in the case was whether evidence was admissible in an action of ejectment showing that a patent under which title was claimed had been issued previous to a survey; in other words, to show it was irregularly obtained. Pendleton, J., in passing upon this part of the case, used this language: "The question therefore is, whether the district court erred in rejecting the evidence? This court has reflected on the case,

and approves of the opinion of the district court as to all the evidence except that which tended to prove that the patent issued without a survey actually made; for if the patent did, in fact, issue without a previous survey actually made, it was void in law; and therefore that part of the testimony ought to have been received; and the court below erred in not permitting it to go to the jury."

In *Noland v. Cromwell*, 4 Munf. 173, decided 1814, the court say, respecting this and the principal case: "In the case of *Hambleton v. Wells*, it was decided that fraud in obtaining a patent might be given in evidence to vacate that patent even on the trial of an ejectment. In *Witherington v. McDonald* it is stated that the case of *Hambleton v. Wells* has not been considered as having settled the law, as it was the only case on the point, and the court nearly equally divided; but I perceive nothing that can excite a doubt as to the right of a court of equity to interfere in such a case. *White v. Jones*, 1 Wash. 118 (S. C. 4 Call, 213,) seems conclusive. In that case, where there was an allegation of fraud, the chancellor had refused relief on the ground that the fraud vacated the patent, and that the patent being null and void, the party might have had redress at law. But this court, although it affirmed the decree of the chancellor in dismissing the bill, did it on a very different ground, viz: that although the fraud was charged, it was not proved; expressly declaring, however, that where fraud is suggested and proved, courts of equity have concurrent jurisdiction, and can afford the most ample and adequate redress."

In *Stringer v. Young*, 3 Peters, 341, the case of *Hambleton v. Wells*, is thus referred to: "In *Hambleton Wells*, reported in a note to 1 Hen. & Munf. 307, the defendants in ejectment in the district court offered evidence to prove that the grant under which the lessor claimed was defective in several prerequisites to a patent. The court of appeals overruled these objections, but determined 'that the district court erred in not permitting the appellants to give evidence that the appellee procured the plat on which the patent was obtained, to be returned to the office, knowing that an actual survey had not been made.' In this case the objectionable act was a fraud knowingly committed by the patentee himself. Even this case has been questioned, though not, as far as is known, expressly overruled. In *Witherington v. McDonald*, 1 Hen. & Munf. 306, the defendant in ejectment offered in evidence to show that the survey upon which the plaintiff's patent was founded, was illegal, and also that the patent was obtained upon a certificate signed by Charles Lewis, as clerk of the land office, instead of being signed by the register or his deputy as is required by law. The defendant excepted to the opinion of the court rejecting this testimony, and appealed to the court of appeals. The judgment was unanimously affirmed in that court. In the course of the trial the case of *Hambleton v. Wells* was mentioned by several judges with disapprobation; and it was said that a single case decided by three judges against two was not considered as conclusively settling the law."

The case of *White v. Jones* is cited in *McClung v. Hughes*, 5 Rand. 484, by Green, J., who gives the following construction to it: "The effect of this case is, that in cases of actual fraud a court of equity has jurisdiction, where there was no reason for failing to file a *caveat*, and will relieve; but will not relieve against a legal title without actual fraud, in favor of a prior equity; and that an entry and survey is not such a notice to a subsequent locator as of itself to affect his conscience, and deprive him of the advantage of his legal title in a court of equity."

In so far as it is stated in *White v. Jones*, that a court of law can avoid a patent for fraud, and that a suit may be brought to set it aside, the decision is not supported by authority. It is well settled that unless a patent for land is void upon its face, or its issue is without authority, or is prohibited by law, it cannot be avoided in a court of law in an action of ejectment: 3 Washburne on Real Prop. 175; *People v. Livingston*, 8 Barb. 253; *Stringer v. Young*, 3 Pet. 320; *Boardman v. Reed*, 6 Id. 328; *Jackson v. Marsh*, 6 Cow. 281; *Jackson v. Lawton*, 10 Johns. 23. In the last case, a leading one, Kent, C. J., after a thorough examination, uses the following language: "Unless letters patent are absolutely void on the face of them, or the issuing of them was without authority, or was prohibited by statute, they can only be avoided by a regular course of pleading, in which the fraud, irregularity or mistake, is directly put in issue. The principle has been frequently admitted that the fraud must appear on the face of the patent to render it void in a court of law; and when the fraud or other defect arises on circumstances *dehors* the grant, the grant is voidable only by suit."

The extent to which a court of law will go to impeach a patent is well stated in *Cooper v. Roberts*, 6 McLean, 93, where it is held that fraud may be shown in procuring a patent at law as the execution of a deed, being executed fraudulently, may be avoided at law; but in neither case can fraud be alleged and proved at law, except in the issuing of the patent, or of the other, in the execution of the instrument.

In *Norvell v. Camm*, 6 Munf. 238, Roane, J., states the true general doctrine. He says: "It is equally clear that a patent, perfect on its face, is not to be avoided in a trial at law, by anything short of an elder patent; it is not to be affected by circumstances of equity tending to show that in a *caveat* court, or in a court of equity, the party relying on it would probably prevail. The jurisdictions of the two tribunals must be kept distinct, and the actual patent must prevail at law, although it may be made to the superior right of the adverse party in another form. In the case of an actual and perfect patent, there is no remedy but to set it aside in a court of equity, or in some other proceeding having that for its direct end and object. It cannot be done in the ordinary progress of a trial at law; the patent alone must prevail. These principles seem to us clear, and are fairly deducible from the case of *Witherington v. McDonald*, 1 Hen. & Munf.; they ought not, therefore, to be departed from." As supporting this general statement of the law, see *Klein v. Argenbright*, 26 Iowa, 493; *State v. Bachelder*, 5 Minn. 223; *Polk v. Wendal*, 9 Cranch, 87; *Boggs v. Merced Co.*, 14 Cal. 279, 361, 362; *Yount v. Howell*, Id. 465; *Leese v. Clark*, 18 Id. 535.

HOOE v. MARQUESS.

[4 CALL, 416.]

ISSUE, WHEN DIRECTED.—If a bill in equity charges fraud, and the testimony be conflicting and unsatisfactory, an issue ought to be directed. **SAME.**—Where a son had obtained a deed from his father, for ninety acres of land and five slaves, in consideration of a certain sum and maintenance for life, after which he sold the land to a third person, who filed a bill alleging that deed to have been recorded, but to have been sub-

sequently destroyed, and another substituted for it of a different import, and the land sold again by the first donor, to a purchaser, with notice of the plaintiff's title, whose deed had not been recorded. It was held that an issue should be directed as to the fact of substitution, and if so, what were the terms of the first deed.

APPEAL from the high court of chancery. Marquess filed a bill against Grigsby, Hooe and Bruce, setting forth that in 1782 plaintiff purchased of the defendant, Mott Grigsby, ninety acres of land, and took a deed therefor; that Mott Grigsby had previously purchased the land from Charles Grigsby, his father, whose deed to him was admitted to record, but afterward destroyed; that a deed of different import was substituted in the place of the one destroyed, by the deputy clerk, who had instigated Charles to sell the land to Hooe, was to have half the purchase money, and who joined in the deed; that Hooe turned plaintiff out of possession by force, and sold to Bruce; that both Hooe and Bruce were purchasers with notice of plaintiff's claim; that Charles Grigsby has since died. The bill prayed for a conveyance of the land and an accounting of profits.

The answer of Mott Grigsby admits the deed to plaintiff for the land, the purchase of the same, and five slaves, from Charles Grigsby for one pound sixteen shillings, and sufficient victuals and clothes during his life, which conditions defendant alleges have been complied with, and states that the deed given him by Charles is not the same as that now on record, the terms and witnesses being different.

Hooe's answer alleges that Charles Grigsby sold to Mott upon certain conditions, for the breach of which he entered and then sold the premises to defendant; that the deputy clerk joined in the deed, as defendant thought he had some claim to the land; denies force, and admits knowledge of plaintiff's deed.

Bruce's answer denies fraud, admits notice of plaintiff's claim, and says that defendant has a bond in one hundred pounds, from Hooe, for a good title.

Depositions were read to show that Charles Grigsby was ignorant and in distress, and that Mott was indolent, careless and poor. The only exhibit was a copy of the supposed substituted deed, which a deputy clerk testified was made from one found in the office in a bundle indorsed "deeds for further proof," and which, reciting as a consideration the sum of one pound sixteen shillings, and the maintenance of Charles Grigsby during life, and that Mott was not to sell the property, under penalty of its reverting to Charles, conveys the land and slaves

to Mott, his heirs and assigns, with a covenant of further assurance.

The court of chancery being of opinion that the defendants were not entitled to the benefit of the condition inserted in the indenture, "among the exhibits, because a right of entry for a condition broken was not assignable," and that Bruce ought not to retain possession of the land because Hooe gained it by combination with the tenant of the plaintiff, of which Bruce had notice, decreed the latter to resign possession to the plaintiff, and account for the profits, which the court were of opinion might be awarded, "although the plaintiff might perhaps have recovered the possession in an action at common law, the defendants not having pleaded to the jurisdiction of the court."

Hooe and Bruce appealed to this court.

Warden and Randolph, for the appellants, contended that the terms of the deed to Mott Grigsby were conditional and Charles could enter for a breach thereof; that a chose in action might be assigned, consequently a right of entry; that the substitution of one deed for another was not proved; that the court of chancery had no jurisdiction.

Washington and Marshall, for the appellee, contended that the conditions of the deed from Charles Grigsby had not been broken; that he had been supported at the expense of Mott, and no worse than before the deed, therefore, Mott's conduct could not be impeached: Shep. Touch. 150. A right of entry cannot be assigned. Hooe and Bruce were not *bona fide* purchasers, and the question as to the substitution of the deed had been submitted upon the evidence. As to the jurisdiction of the court of chancery, it could be maintained; because exception thereto comes too late; because defendants' title can only be impeached in equity, as it originated before the act of 1785; because equity alone can compel defendants to deliver up their deeds to prevent future litigation, on the ground of fraud.

By Court, PENDLETON, President. The frauds charged in the bill would, if proved, be a foundation for application to a court of equity; and this dispenses with the necessity of considering the general question of jurisdiction under the act of assembly; an important one indeed; and reserved until its decision shall be necessary.

Proceeding to the merits, we observe that the chancellor has omitted to decide the first question of contest between the parties, namely, that relative to the suggestions in the bill of the

substitution of the deed, which we think ought to have been determined; and, as the testimony is conflicting and unsatisfactory, that an issue ought to have been directed to ascertain whether there was such a substitution; and if so, what were the terms of the original deed before any further proceedings were had in the cause.

The decree, therefore, is reversed, and the following is to be the entry:

The court is of opinion that the suggestions of the bill being that the deed from Charles Grigsby to Mott Grigsby, now remaining in the clerk's office of King George county court, is not the true deed executed between the parties, but was fraudulently substituted for the true one, which contained no clause of forfeiture upon the sale of the property; and this not being confessed by the answers, was the first subject of contest between the parties, to which the testimony of several witnesses relates, and yet is not decided upon either way, by the decree of the said high court of chancery, unless by implication, passing to the decision of consequent points in the cause; and in this there is error in the said decree, therefore it is decreed and ordered that the same be reversed and annulled, and that the appellee pay to the appellants their costs by them expended in the prosecution of their appeal aforesaid here. And this court proceeding to give such decree as the said high court of chancery should have pronounced, is of opinion that, since the testimony as to the fraud charged is conflicting, and not satisfactory to the court to decide the question for either party, the fact ought to be determined by a jury, therefore it is further decreed and ordered that an issue be made up in the said high court of chancery and tried as usual by a jury, whether the writing now being in the clerk's office of King George county court, as mentioned in the deposition of Caleb Smith, purporting to be a conveyance from Charles Grigsby to Mott Grigsby, be the deed of the said Charles or not. And if found in the negative, to try whether the said Charles made and executed any other deed to the said Mott for conveying the lands in question, and whether the conveyance was absolute, or subject to any and what conditions. Which being tried and certified to the satisfaction of the said court, such consequent proceedings be had thereupon to a final decree, as to the said court shall seem proper, this court not having decided on any of the points in the former decree.

HOME v. RICHARDS.

[4 CALL, 441.]

OWNERSHIP OF BED OF NAVIGABLE RIVER.—The ownership of the bed of a navigable river is in the commonwealth, and cannot be the subject of private grant.

SAME OF RIVER NOT NAVIGABLE.—In a river not navigable, the owner of the soil on one side is the proprietor of the bed to the middle of the stream.

APPEAL from the district court. It appeared that in 1795, Adam Hunter and Patrick Home, as executors and devisees of James Hunter, and James Hunter, also a devisee, petitioned the county court of Stafford for permission to build a mill "on their own land, lying on the waters of the Rappahannock, and to build a dam to abut upon a rock within fifty yards from the north side of said river, the said fifty yards being either the property of the said devisees, or of the commonwealth." The jury reported that the rock was twenty-five yards from the north bank, and that the erecting of the mill would not be detrimental to the health of the neighbors, nor would overflow the adjoining lands, nor injure the mansion-house, curtilage, office or garden of any person, nor obstruct ordinary navigation, or the passage of fish. William Richards opposed this petition, and on the twelfth October, 1795, the county court, on consideration of the petition and the evidence produced, refused leave to build the mill. From this judgment petitioners appealed to the district court, where, all errors in point of form being waived by the parties, a decree of affirmance was rendered. The petitioners then appealed to the court of appeals.

In 1796, William Richards, as owner of the land on one side of the river Rappahannock, the bed whereof he stated to be in the commonwealth, petitioned the said county court for permission to build a mill, and that an acre of Mortimer's land, situate in the county, on an island in the river opposite petitioner's land, on the north side, might be condemned as an abutment for a dam to the mill. The jury reported that the lands above and below the acre sought to be condemned would not be overflowed, that the passage of fish would not be obstructed, as the dam would cross but a small part of the river, and that neighboring owners would not be annoyed by the stagnation of the waters. Patrick Home and Adam Hunter, as devisees as above mentioned, opposed the petition and filed three bills of exceptions, two of which were unimportant. The

third set forth that to prove title to the land on one side of the river, Richards offered: 1. A grant from the proprietors of the Northern Neck to Martha Vicaris, for one thousand two hundred and sixty acres of land on the north side of the river; 2. A deed from Martha Todd to John Dixon for nine hundred acres on the north side of the river, including the island referred to called Vicaris Island; 3. A deed from Todd to Dixon for the same land; 4. Deed from Dixon to John Richards for all that parcel of land adjoining Falmouth bounded by James Hunter's lines on the south, and containing three hundred acres, more or less, including several islands; 5. The will of John Dixon, in 1762, devising the upper moiety of the nine hundred acres, including Vicaris Island, to his son, John Dixon; 6. The will of John Richards, devising the three hundred acres to his son, the petitioner. The bill of exceptions further stated, that to prove that Richards did not own the land upon one side of the river, and that the bed of the river was not in the commonwealth, the defendants, Home and Hunter, offered in evidence: 1. The patent to Vicaris for the one thousand two hundred and sixty acres; 2. Deed from John Dixon, in 1768, to James Hunter and his heirs forever, for "all that parcel or strip of land lying in King George county, on the flats of Rappahannock river, beginning at the edge of the river at the mouth of the said Dixon's mill-run, on the upper side thereof, at the point of a large rock; thence running up the river to the foot of the hill opposite to the lower end of Vicaris Island; thence back from the river a sufficient distance to make a road of a proper width for two wagons to pass each other; thence keeping the same distance from the river down a parallel course with the river to the said mill-run;" together with all the right and title of John Dixon "to certain rocks and islands in the river aforesaid to the extent of fifty yards from the river side, to begin from the upper side of Falmouth ferry, and to go as far up the river as to the smooth water between Vicaris Island and the main land in King George county, but so as not to extend into Vicaris Island, for the purpose of rendering the said river navigable for batteaux, by a canal to his, the said James Hunter's forges," to have and to hold, etc. To this deed was annexed a memorandum, as follows: "It is the true intent and meaning of the parties that the said James Hunter and his heirs shall have the privilege of extending the wagon road from the bottom of the hill opposite to the lower end of Vicaris Island, as far as the forge." A plat in connection with the deed

showed that the line parallel to the river was terminated at one end by a line from a rock on the main land to a rock in the river, nine poles distant from the water's edge, and at the other, by a line from the main land to some rocks one pole distant from the water's edge, where Hunter's and Dixon's lands joined, containing about nine acres of land and ten acres of rock. Both the deed and plat were attested by the same three witnesses; 3. A deed from Thornton to James Hunter for an acre of land a few yards from Vicaris Island; 4. James Hunter's will, under which the petitioners claimed; 5. Deed from Dixon to James Hunter for seven acres of land; a wagon road from Falmouth to Hunter's iron works, through the lines of Dixon from which the seven acres are taken as the road now lies.

A witness testified that there was sufficient distance for a road between Richards's foundation for his mill and the river. The county court, in April, 1797, granted permission to Richards to build the mill; the district court affirmed the judgment, and from this decree of affirmance Home and Hunter appealed to this court.

The two causes came on for argument at the same time upon the merits, errors in point of form being released. The appellants contended that the memorandum and deed were to be taken together, and that, therefore, the land upon the main as described in the plat passed to Hunter.

The appellees insisted that a right of way merely had been granted: 3 Bac. Ab. 54; 2 Str. 1004; and that the bed of the river was in the commonwealth, the stream being navigable.

ROANE, J. The deed to Hunter conveyed a fee-simple in all the lands it professed to grant; but those were the enumerated parcels only, and not any others. The parties, however, appear to have afterward thought that there would be a convenience in continuing the road from Vicaris Island to the forge, and therefore, the memorandum was made; but that stipulated for a right of way merely, and did not convey the soil, which, consequently, passed by the deed to Richards. It is said, in opposition to this, that the plat annexed to Hunter's deed passed the lands contained within the lines there laid down, and that these comprehend the land claimed by Richards as the place for erecting his mill. But that is an unreasonable construction, and would take in part of Dixon's other lands, which, I presume, would hardly be contended for. As Richards's grant extends to the edge of the river, he, necessarily, has the land on one side of it; but it is not clear to whom the bed of the

river belongs, for it is not stated in the proceedings whether the stream is navigable in those parts or not. If it be, it is plain that the bed is not in the appellants, as the soil of navigable rivers cannot be granted. And if it be not navigable, then the bed is not comprised, in terms, in the deed to Hunter, and the contiguous land upon the main did not belong to him; so that either way the appellants are not entitled to it. The bed must, therefore, be either in Richards, as proprietor of the main land, and, consequently, owner to the middle of the river, or in the commonwealth, as a public highway for all the community, which last is probably the case. But the inquiry is unimportant; for Richards, whether the bed be in himself or in the commonwealth, may, in either event, exercise full dominion over the place through which the right of passage is claimed, although the appellants will be entitled to redress, if the way should ever be refused them. There is, then, no objection to Richards's petition upon the score of title to the land where he proposes to erect his mill. And upon the merits, independent of the title, I think he has the best claim to preference, not only because his land is of greater extent and situated on the main, which seems more consistent with the views of the legislature, but because his adversaries have two mills in the neighborhood already, which looks like monopoly. I think, therefore, that Richards ought to have leave to build his mill, for if the exceptions to the inquisition were more substantial than the appellants' counsel represents them to be, they are all released. Whether the appellants should have leave to build a mill, on their petition, also, may depend upon evidence not before the court; and, therefore, if they wish for an opportunity to procure it, I am disposed to indulge them; but, in the meantime, I think the judgment in the other case ought to be affirmed.

CARRINGTON, J. Hunter himself seems to have been of opinion that he had the privilege of a road only; and the claim to the soil appears to have been an after thought. Richards's land, by the terms of his deed, extends to the water's edge; and although it is subject to Hunter's right of way, that does not prevent him from the use of the land in every other respect; for if Hunter's representatives are at any time obstructed in the enjoyment of their privilege, they will be entitled to redress by a suit for compensation in damages or for some reasonable provision for a passage, and not to the exclusive occupation of the soil in this particular place. There is consequently no objection to the petition of Richards upon that ground. The bed of the

river is probably in the commonwealth, and therefore could not be conveyed. But it is not necessary to decide that question in this case; for, as the bed is not comprised in the deed to Hunter, it must be in Richards's as owner of the land on one side if the river be not navigable, or in the commonwealth if it is; and either will authorize the application of Richards. As to Home's petition, but little was said about it. He shows no title to anything but the rocks, which were probably conveyed for a particular purpose, namely, that of being removed in order to be used as materials for building at some other spot, and not as a site for erecting a mill; and if so, the appellants have nothing to rest upon. But I give no opinion upon that point now, and shall be ready to hear further evidence upon it. In the meantime, however, I think the judgment in the other case ought to be affirmed.

PENDLETON, President. The objections to the inquisition, are so far from being substantial, that they scarcely amount to informality. But be that as it may, matters of form are all released, and therefore the objections fail. Whether the court could have directed a jury to try the title, I shall not decide until the argument in the case of *Wood v. Boughan* is over; but if they had the power they were clearly not obliged to exercise it, and therefore the exception upon that ground cannot be sustained. The observation of the counsel, that the law violates private rights, and should be construed strictly, has but little weight with me; for none of the private rights assailed by the act are in controversy. It might have applied to Mortimer, or to the appellants, if their lands would be overflowed by the erecting of Richards's mill; but nothing of that sort appears, and therefore the observation falls to the ground. These works are of importance to the public, and should be favored when not inconsistent with private rights, in the view of the legislature. The real question then in this case is: Whether Richards is well founded in his application for leave to build a mill; and that depends upon the rights of the parties. His title to the land on which he means to erect his mill, is clear, for the deed to Hunter only grants certain enumerated parcels, of which the land of Richards is not one, and the memorandum and plat do not change the nature of the conveyance, as the first merely stipulates for a right of way, and the latter, the limits within which it is to be enjoyed, but neither passes the soil. A right of way then is all the appellants have; and what is the effect of such a privilege? although Hunter's representatives

may have a right to point out a particular way, having due regard to convenience, yet that does not hinder the proprietor from exercising his right as owner of the land. Whenever a request for the way is made, the claims for the appellants may be discussed, and the location of the road settled; but in the meantime Richards is entitled to the full exercise of his rights as proprietor of the soil. This brings us to inquire to whom the bed of the river belonged. It is not stated in the proceedings whether the stream at this place is navigable or not; but it is certain that the bed was either in Dixon or the commonwealth. If in Dixon, he did not mean to convey it to Hunter, for his grant was only of the rocks, the islands, and perhaps the land under the rocks, but not the bed of the river; and if so, then it was embraced by the grant to Richards, or else it is the commonwealth, as a public highway, never granted, because incapable of being appropriated to the use of a single individual. But it is altogether immaterial whether the bed was in the commonwealth or in Richards; for in either case, the latter owning the contiguous land was authorized to apply to the court for leave to build a mill. As to the petition of Home upon the records, taken separately, there would appear to be no reason to oppose it; but, taken together, it does not seem either necessary or reasonable to erect both mills. In questions concerning the grant of a privilege, diffusion into several hands, instead of a monopoly in one, is desirable; and, therefore, as Hunter's representatives appear to have two mills in that neighborhood already, I think Richards's mill should be preferred. But I do not by this mean to preclude the appellants; for if they can show the propriety of granting them leave to build another mill, I shall be ready to hear them. I think proper to mention, however, that I also have some doubts whether the deed to Hunter passed the land under the rocks, which appear to have been conveyed for the purposes of masonry and objects at other places, instead of a site for a mill, and if so, the petition in this case is entirely defected, as the petitioners would not be the owners of the land on either side of the stream, and, therefore, could not satisfy the requisitions of the act of assembly.

The judgment in the case of Richards's petition is to be affirmed, and the other case continued.

Judgment in the case of Richards's petition unanimously affirmed.

In the case of the petition of Hunter's representatives, **PEN-
DLETON**, President, delivered the opinion of the court, as follows: *Home v. Richards* was thought to have been settled by the former decision, but the parties desired to be heard on the evidence, and the only question now is, whether the mill would be injurious. The witnesses are divided, and the county court and district court sitting in the neighborhood, have both decided that it would, and there is nothing before the court to contravene that opinion. Therefore, the judgment of the district court must be affirmed.

Judgment affirmed.

See *Palmer v. Mulligan*, ante, 270.

MAYO v. CARRINGTON.

[4 CALL, 472.]

RESIDUARY DEVISE.—A testator directed that his executors should petition the legislature to emancipate his slaves; that in case they should not be able to carry out this provision of the will, he then devised part of the slaves to a certain legatee, and the rest of them, and "all his other property," to certain relations. This was held an absolute disposition of the residuum, and not a devise upon a contingency.

CONSTRUCTION OF "ALL HIS OTHER PROPERTY."—A residuary devise of "all his other property," comprehended lands as well as personalty, for the mention of slaves did not restrict the bequest, and the words "all his other property," carried a fee in the lands.

APPEAL from the judgment of the general court. William Mayo, as heir at law of Joseph Mayo, brought an action of ejectment against Paul Carrington and others, for a certain tract of land. A case was agreed upon for the opinion of the court, setting forth the following facts: Joseph Mayo, by his will, made the twenty-seventh of May, 1780, and proved the tenth of October, 1785, after sundry specific devises provided: "It is my most earnest request that the gentlemen who shall be named and appointed executors of this, my last will, petition the general assembly for leave to set free all and every one of the slaves, of which I may die possessed, etc. But provided it shall not be in the power of my said executors to get this act of humanity effected (i. e. to get the slaves of which I may die possessed, set at liberty), on that condition, and no other, I give and dispose of the said slaves and my other property which may remain after discharging the above legacies and devises, in the manner

following, viz.:" three slaves were given to one Tabb; then "all the residue of my slaves and other property remaining after the discharge of the above legacies and devises, I give to be equally divided between the" sons of Joseph Mayo, the sons of William Mayo, and the sons of George Carrington, to them and their heirs forever. George Carrington, Paul Carrington, William Mayo and Miles Selden were appointed executors; but the first died before qualifying, and the survivors renounced the office, whereupon Paul Carrington, Miles Selden and Joseph Carrington took administration upon the testator's estate. The administrators applied the personalty, except the slaves and that specifically devised, to the payment of the debts, and for the satisfaction of such claims as remained unpaid, the slaves were hired out. An act of assembly was passed in October, 1787, emancipating the slaves, and carried into effect by a decree of the high court of chancery in November, 1789.

The plaintiff claimed the tract in question as heir at law of the testator, and is the same William Mayo mentioned in the will; the defendants are the residuary legatees of the testator. The general court gave judgment in favor of the defendants, and plaintiff appealed.

The principal points in dispute were, whether the whole of the residuary devise was contingent and dependent upon the failure of the attempt to emancipate the slaves, and whether the word property included real as well as personal property.

By Court, PENDLETON, President. The testator having made several specific devises, and being about to bestow the rest of his property, there was one species of it which he wished to exempt from the general disposition he intended to make of the residuum, namely, his slaves, whom he desired to manumit. But, as the law did not at that time permit emancipation, and it was uncertain whether application for that purpose to the legislature would be successful, there was a necessity for some provision in case the effort should be disappointed. Accordingly, he directed that his executors should endeavor to procure an act of emancipation from the legislature; but if the attempt failed, a specific bequest of part of the slaves was made, and the rest delivered to the same legatees to whom he gave the general residuum. In this view of the subject, it would seem to be unimportant, with respect to the disposition of the surplus, whether the slaves were ever emancipated or not, as they were not to lead, but to follow, the devise of the residuum.

It was said, however, that the contingency ran through the

whole devise, and that the bequest was to depend upon the issue of the attempt to manumit the slaves; so that, if that failed, the residuum of which the slaves were to be part was to be divided among the residuary devisees; but, if it succeeded, no disposition of the residuum was made. And, therefore, as the latter event had taken place, that the whole of the undevised lands descended upon the appellant as heir at law to the testator. That view of the case, however, the court thinks is not sustainable; for no reason can be assigned why the testator should leave the surplus entirely undisposed of, unless the attempt to manumit the slaves should fail. On the contrary, the residuary devisees were favorite relations, and he could have had no motive to disappoint them as to the whole subject, merely because the slaves might not, in event, belong to it. His primary object was to bestow the residuum; and whether the slaves would take the same course was a secondary consideration with him. Accordingly, the bequest, as to them, is not so much a devise of the property as of the possibility; part of which, if the emancipation failed, was to go to Mr. Tabb, and the rest to the residuary legatees, along with the general surplus.

What was said about the contingency, therefore, may be thrown out of the case, and then the question is, whether all the residuum, both real and personal, passed by the devise.

The word property, we think, comprehends everything that had not been disposed of. For, generally speaking, it is just as applicable to lands as to personalty; and there is nothing in this will to confine it to the personal estate. Including the slaves in the devise has not that effect. For it is not a bequest of the residue of the property followed with an enumeration of personal articles only; but the parts of the devise are kept separate and distinct, the slaves being mentioned first, and the other property afterward; thus leaving the word property unrestrained, and to operate according to the usual sense of the term. It is equally clear that the whole interest in the lands passed. For that is the natural import of the word property; which is at least as comprehensive as the terms "all my estate," "all my worldly substance," or "all my real effects." And each of these has been held to carry a fee: Cowp. 299, 355. But in the case of *Huxtep v. Brooman*, 1 Bro. Cha. Ca. 437, is perhaps stronger. There the devise was, "I give and bequeath to Mary, daughter of Mary Huxtep, and likewise to the son and daughter of Susan Topley, all the overplus of my money; and

likewise beg of my executor that he will pay into the hands of the above children's friends all the money that is due to me on settling my father's account. I give and bequeath to them all I am worth, except twenty pounds, which I give to my executor, Mr. Thomas Brooman." The testator was entitled to a share with his brothers in a gavelkind estate which had descended from his father. And it was held by the lord chancellor that the terms "all I am worth," without other words to control them, passed the real as well as the personal estate. That case contained a mixture of real and personal estate, and is very like the present, as the words, "all I am worth," are not more comprehensive than the words "all my other property."

The court is, therefore, unanimously of opinion that the judgment should be affirmed.

See *Read v. Payne*, ante, 550.

PENDLETON'S EXECUTORS v. STEWART.

[5 CALL, 1.]

SALE OF LAND—RELIEF IN EQUITY.—Where a tract of land was sold as containing eleven hundred acres, more or less, at a fixed price, and it turned out that it contained less than the quantity stated, the purchaser was held not entitled to relief in equity.

BILL filed for specific performance of a contract made by Stewart with the plaintiffs' testator for a tract of land deducting therefrom such parts as it had been discovered belonged to other people; with a corresponding deduction from the purchase money. The answer insisted, that the land was not sold by the acre, but at a fixed price for the whole; that after it was discovered that there was a deficiency in the quantity of land, the defendant offered to cancel the contract, but the testator refused. The agreement was eleven hundred acres, more or less. A witness stated that he was present at the contract, and understood it to be as expressed in the writing; that he heard nothing said respecting a deficiency of title, but conceived that Stewart was to make a good one.

The court of chancery dismissed the bill with costs upon a hearing, and thereupon the present appeal was taken.

Randolph, for the appellants.

Williams, contra.

TUCKER, J. This is a bill brought by the executors of Pendleton, for relief and compensation for a deficiency of one hun-

dred and sixty acres of land, alleged to have been discovered on a sale made by the following agreement, drawn by the purchaser, who lived near the lands, the seller residing at a considerable distance from them, and the contract being made at the house of the latter, who showed a patent for the lands to one Dillard, dated in 1736, to the buyer, and delivered him the patent, as soon as the contract was made, for the purpose, it would seem, of having a deed prepared according to it.

“Memorandum of an agreement between William Stewart of the county of K. G. and James Pendleton, of the county of Culpepper. The said Stewart has agreed to sell to said Pendleton eleven hundred acres of land (more or less), adjoining said Pendleton, for the sum of three hundred and thirty pounds, to be paid at four equal yearly payments, the first to commence on the twenty-fifth of December, 1784. Witness our hands and seals this thirtieth day of September, 1783.”

The bill charges that the agreement between the parties was, that the lands should be paid for at the rate of thirty pounds per one hundred acres, and that it was, by mistake, written as above.

The answer denies that the defendant sold the land at thirty pounds per one hundred acres, and alleges that he sold it at a fixed price; and states some explanatory circumstances which happened at the time. That hearing, afterward, that sixty or seventy acres of land were lost, he offered to cancel the contract, which Pendleton refused.

One witness, who was carried down to Stewart's house by Pendleton, and was a witness to the contract, said that he was privy to the whole conversation between the parties; that he heard nothing about a deficiency of title; but always conceived Stewart was to make a good and sufficient title; and that he understood the contract to be expressed in the written agreement, which was drawn by Pendleton. Another witness swore that he surveyed the land by Pendleton's desire; that some of the lines fell short, being stopped by other persons' lines, as he was informed; and that the quantity only amounted to nine hundred and forty acres, or thereabout.

Pendleton lived ten years after the contract, and nearly two years after the judgment against him for the purchase money, without applying to a court of equity for relief.

Three points were made in the argument by the appellants' counsel: 1. That there was a real deficiency; 2. That Pendleton was entitled to compensation for it; 3. That the bill having

prayed for general relief, the chancellor, instead of dismissing it *in toto*, should have decreed the defendant to make a title upon payment of the money.

1. As to the first of these points. The deficiency, though suggested in the bill, is not admitted by the answer, nor absolutely denied; the defendant saying only that "some time after the contract, he heard it said that part of the land, sixty or seventy acres, were lost, but he knows not the fact." And Wiggenton, who made the survey privately, at the desire of Pendleton, only says that he was stopped by other persons' lines, as he was informed; but who those other persons were he does not say, nor are their names mentioned in the bill. Here, then, is a defect of proof.

2. Had there been no such defect of proof, it does not appear that in this case the plaintiff would have been entitled to compensation. The principle established by the decree in the case of *Jollife v. Hite*, 1 Carr. 329 (1 Am. Dec. 519), seems to me to be perfectly correct, and imply that the warranty tacitly annexed to every contract, that the thing bought or sold, shall correspond with the representation made of it at the time of concluding the contract between the parties, is neither waived nor destroyed by the insertion of the words "more or less," in a contract for the sale of lands by a specific number of acres, if an error, beyond what may reasonably be imputed to the variation of instruments, or other similar causes, be afterward discovered. But where the real contract is to sell a tract of land, as it may contain, more or less, fully understood to be so between the parties, those words, more or less, imply a waiver of the warranty as to the specific quantity, on the part of the buyer, and an agreement on the part of the seller not to demand more than the fixed price, although, on the one hand, there should be an excess, or, on the other, a deficiency in the quantity supposed; both parties being willing to abide by such presumptive or probable evidence of the quantity as they were then possessed of, but of which neither pretends to have an accurate and perfect knowledge, and which neither insists upon as a condition annexed to the purchase or sale, which in the other case is supposed to be done and to be reciprocal.

In this case, the contract was drawn by the purchaser, and was founded upon a proposal moving from him to the seller, who lived remote from the land, and possibly knew no more of it than was expressed in the patent, whilst the purchaser, whom it joined, might be presumed to have such a knowledge of it as

to enable him to form a competent judgment of its gross value, without regard to the specific quantity which the tract might contain. The evidence which seems to have been relied on by both parties was the patent, which being nearly fifty years old, might, as is not unusual, be supposed to comprehend a larger quantity within the lines than was expressed in the patent. The buyer was probably induced, from this circumstance, to take the tract in gross, and the seller made no reserve or condition of further compensation in case of an excess. The answer positively denies that the sale was at a certain rate per one hundred acres, and insists that it was for a fixed price. This is not contradicted by any testimony, and corresponds with the agreement drawn by the purchaser himself; and thus clearly brings the case within the latter principle established by the decree in *Jollife v. Hite*, 1 Am. Dec. 519. Besides, the defendant states an offer, which is not denied, made by himself to Pendleton, upon hearing that the land fell short of the quantity in the patent, to cancel the contract, which Pendleton refused; and which proves that he was not, in fact, deceived or dissatisfied with his purchase. The purchaser lived ten years after the contract, and near two years after the judgment against him, without any attempt to obtain relief from a court of equity for this supposed deception; and, probably, during the whole time was enjoying the benefit of his purchase by cultivating the lands.

3. As to the third point, it is not suggested that the defendant had refused to make a deed for the land, pursuant to his agreement; but only such a one as Pendleton insisted on. The general relief, therefore, does not appear to have this object in contemplation; but if it be thought proper to amend the decree so far, I have no objection.

ROANE, J. If the decision of this case had turned solely upon the written agreement of the thirtieth of September, 1873, I should probably have been of opinion, under the principle laid down by this court in the decree in the case of *Jollife v. Hite*, 1 Am. Dec. 519; that the appellant was entitled to an abatement for the suggested deficiency (when proved to exist) beyond "what might be reasonably imputed to small errors from variations of instruments or otherwise;" and this is the rather because that agreement does not profess to relate to a "tract of one thousand and one hundred acres, more or less," but to "one thousand and one hundred acres of land, more or less."

But the appellants, not satisfied to rest on this foundation, have asserted in their bill a pro rata contract; and have called on the appellee to say, whether such was not the real nature of the one in question. This inquiry, under the decision aforesaid, it was competent for the appellants to make.

The answer of the defendant, substantially responsive to the bill in this respect, refutes this idea by stating a communication preceding the final consummation of the contract, whereby the appellants' testator agreed to take the risk of deficiency upon himself. It is true Mr. Bowie states that he was privy to the whole conversation on the subject, and heard nothing said about a deficiency; but negative proof, unsupported by other testimony, or by circumstances, is insufficient to outweigh the evidence of the answer. The agreement itself does not come in aid; for, however it may be in point of construction and legal operation, it affords no evidence of the sense of the parties having been opposite to that relied on in the answer; and it is worthy of remark that the appellee has also relied on it as operating in his favor.

Neither are there any circumstances having any favorable effect in the appellants' favor; they are rather the other way, such as Pendleton's contiguity to, and probable knowledge of the land, and the distant residence of the appellee from it.

I think, therefore, that the chancellor was right in the main principle of the decree; but that he ought to have decreed a title to the land, subject to the abatement in quantity as aforesaid, on payment of the purchase-money, instead of dismissing the bill. I take this opportunity to say that I accord with the judge who preceded me in his understanding of the decree in the case of *Jollife v. Hite*. My dissent in that case from the opinion of the court arose, not from any dissent in relation to the principle as stated in the decree governing this decision, and as now explained, but from my not understanding the contract in that case to have been as understood by the majority of the court.

FLEMING, J. The written agreement is so plain that it is impossible that either party could have misunderstood it. The words are express that eleven hundred acres, more or less, were sold without any stipulation for deficiency or excess. Consequently neither of the parties could have expected any allowance upon those grounds. Although eleven hundred acres are mentioned, it is manifest that those were used as terms of description and not of warranty; for the understanding was that

one should sell and the other purchase the tract for three hundred and thirty pounds, whatever might be the number of acres contained in it, with regard to which each party probably made his own calculation. The written language of the contract, therefore, ought to govern; for there is not the slightest evidence of the supposed stipulation for thirty pounds per hundred acres, nor of any fraud or concealment. On the contrary, Pendleton, the purchaser, who lived adjoining the land, and therefore had a better opportunity of forming a conjecture as to the quantity than the seller, who lived at a distance, was the writer of the contract; and with all these advantages on his side he has stated that the sale was of eleven hundred acres, more or less, without any qualification, thereby evincing his own impression that neither excess nor deficiency was to be compensated. It is, consequently, like the case of *Jollife v. Hile*, which was not inconsistent with *Quessnel v. Woodlief*, as the latter was a case of fraud. I am, therefore, of opinion that the purchaser was not entitled to any deduction from the price on account of the deficiency; but the appellee ought, on receiving the purchase money with interest and costs, to convey; and the decree in not providing for it was so far erroneous.

CARRINGTON, J. I admit that the defendant cannot, by his answer affirming a new matter, swear himself into an interest; and that as far as the answer in the present case is not responsive to the bill, it is to be disregarded, as the new matter is not supported by evidence. But, in some respects, the answer is responsive to the bill; and to that extent it must be contradicted by two witnesses, or one witness and strong circumstances, or it will prevail. Examine the case under that view. The bill refers to the written contract expressly, but charges that the sale was at the rate of thirty pounds per hundred acres, and that the written memorandum is not according to the actual contract. The answer, on the other hand, refers to the written agreement also as containing the actual contract, and denies that the sale was at the rate of thirty pounds per hundred acres. The parties, then, are at issue upon those points; and so far the answer is responsive to the bill, and must be contradicted according to the rules of evidence in equity, or it will be conclusive. But there is no such evidence. For Bowie, the only material witness for the plaintiff, says: that the contract was, as it is stated in the writing, drawn by Pendleton; and although he adds that he always considered that Stewart was to make a good title, he neither explains what he meant by a good title, gives

any reason for the opinion, nor states anything to have passed between the parties indicative of a contract different from the writing, or from which any fraud or concealment on the part of Stewart can be inferred. Indeed the reverse is presumable; for as Pendleton lived adjoining the land, he was probably better acquainted with the boundaries and the area they contained, than Stewart, who lived at a distance and was a stranger to both. In this situation of things the contract was made, importing upon the face of it that there was to be no compensation on either side for deficiency or excess; for it states expressly that the land was sold for eleven hundred acres, more or less, and at the fixed price of three hundred and thirty pounds. Under this view of the case it was a mere bargain of hazard, and falls precisely within the principles laid down by the majority of the judges in *Jollife v. Hite*, which, as has been observed, was not inconsistent with *Quesnel v. Woodlief*, the latter having turned upon the fraud. The decree, therefore, is right in the main; but it ought not to have dismissed the bill without decreeing a conveyance of the land upon payment of the purchase-money with interest and costs; and to that extent it should be corrected.

Lyons, President. My sentiments upon questions of this kind were delivered at large in the case of *Jollife v. Hite*, 1 Call, 301 (1 Am. Dec. 519). I then thought, as I still do, that the words, more or less, standing alone, were subject to restrictions, and that when a considerable deficiency occurred, there should be relief, because it afforded evidence of mistake, on both sides; but that a small deficiency, arising from the variation of instruments or other causes, should be disregarded. In the present case, therefore, I think there should be relief; but, as the rest of the judges differ from me in opinion upon that point, although they concur that the bill ought not to have been dismissed, as the land should be conveyed upon payment of the purchase-money and interest, the decree is to be reversed, and a conveyance directed upon those terms, agreeable to the following entry :

“The court is of opinion that the appellants are not entitled to any deduction from the price of the land in the bill mentioned, on account of the deficiency in the quantity of eleven hundred acres expressed in the patent granted to Thomas Dillard, referred to in the proceedings by reason of its interference with prior patents, or prior better titles of others, holding lands adjoining thereto, it appearing satisfactorily to this court, from

the whole evidence arising from the bill, answer, and exhibits, in this cause, to have been the intention of the parties, and so fully understood between them, that the appellee only intended to sell to the testator of the appellants his right under the said patent, to the entire tract granted thereby, as containing eleven hundred acres, more or less, not warranting it to contain any certain quantity; and, therefore, he was not bound to make good the deficiency of eleven hundred acres, if any such appear on a new survey; but that the appellee ought to convey the said tract of land, according to the said agreement, to the appellants, or to the person or persons entitled to the same, under the will of their testator, James Pendleton, deceased, on his receiving the full amount of the purchase-money due, with interest, and the cost of a suit recovered by him in the district court of Fredericksburg, against the said James Pendleton in his lifetime, for the recovery thereof, and that the said decree is erroneous in not directing such conveyance to be made on the terms aforesaid; therefore it is decreed and ordered that the said decree be reversed, etc.

In *Caldwell v. Craig*, 21 Gratt. 137, decided in 1871, the case is thus referred to by Staples, J.: "The principle upon which this case was decided is, that where the real contract is to sell a tract of land as it may contain, more or less, fully understood to be so, the purchaser takes the tract at the risk of gain or loss by deficiency or excess in the number of acres contemplated;" and on page 140, the same judge, citing the principal case, says: "Such language cannot, upon any fair and reasonable construction, be understood as a positive affirmation of quantity. That it is to be regarded as a mere matter of description, and not of itself giving the character of the contract, is settled."

This case is also cited in *Blessing v. Beatty*, 1 Rob. 304.

BEDFORD v. HICKMAN.

[5 CALL, 236.]

FRAUD IN RESPECT TO QUANTITY OF LAND SOLD. — Where a contract was made for the sale of nine hundred acres of land, more or less, and the tract found to contain only seven hundred and sixty-five acres, the purchaser will be relieved in equity, it appearing that the seller knew of the deficiency at the time of the sale, but did not disclose it.

APPEAL from the high court of chancery. The facts were: Hickman filed his bill in the county court, praying for an injunction against a judgment recovered against him by Bedford on a bond for six hundred and fifty pounds. The bill stated,

that the bond was given in part payment for a tract of land sold to Hickman by Bedford, as containing nine hundred acres, more or less; that since the purchase, the plaintiff, Hickman, has discovered, that by survey the tract contained seven hundred and sixty-five acres, and by original deeds only seven hundred and five; that defendant knew of this deficiency at the time of sale, while plaintiff was ignorant thereof; that defendant had the original deeds in his possession, and was advised by one Taylor at the time of the sale, that plaintiff should be informed of the difference; that defendant, with intent to defraud, refused to tell plaintiff thereof, and wished Taylor to suppress the original deeds.

The answer denies the fraud and the request to suppress the deeds; avers that he sold the lot to plaintiff for more or less, and offered to survey the tract for plaintiff, who chose to take it as for nine hundred acres; and states that defendant purchased the land from one James Bedford as containing nine hundred acres.

Copies of the bond, the deed under which defendant claimed, wherein the land was estimated at nine hundred acres, more or less, and the original deeds describing the land as containing seven hundred and nine acres, were exhibited at the trial.

The depositions of two witnesses stated that Taylor said he was requested by Bedford to suppress the original deeds, and that was the reason Taylor did not show them to Hickman. It also appeared in evidence, that defendant had the deeds in his possession prior to the contract, so that he was supposed to have known their contents; and that he represented to plaintiff that the lands were always held for nine hundred acres by defendant's forefathers. Of ten receipts for quit-rents of the premises, four were as for taxes on seven hundred and nine acres, and six on nine hundred acres. One witness testified that he did not think defendant knew the quantity, or desired the suppression of the deeds.

The county court granted a perpetual injunction, which was affirmed by the high court of chancery; and from this decree of affirmance the defendant appealed to this court.

Randolph, for the appellant, contended that no fraud was proved; that Hickman was bound, the sale being of property containing a certain number of acres, more or less.

Call, for the appellee, urged that Bedford should have made known to Hickman the contents of the original deeds; that to

make a bargain of hazard binding, it is necessary that all the circumstances should be disclosed, otherwise the parties do not contract on equal terms: *Jollife v. Hite*, 1 Call, 301 (1 Am. Dec. 519).

By Court, LYONS, President. Decree affirmed.

See *Pendleton v. Stewart*, ante, 583, and see note to *Bostwick v. Lewis*, ante, 80, where it is shown under what circumstances a misrepresentation in respect to quantity of land, will be actionable.

BRAXTON v. COLEMAN.

[5 CALL, 433.]

WHEN IMPROVEMENTS NOT SUBJECT TO DOWER.—The owner of a tract of land sold it with a mill thereon. The mill was subsequently carried away and another built on the same site. A third mill, upon a more extensive plan, was afterward built. The vendor's widow was held to be entitled to dower in the land only and not in the mill.

APPEAL from the court of chancery. Carter Braxton, during his marriage, sold a mill with fifty acres of land attached to it; the mill was subsequently carried away by a freshet, as was another, built afterward on the same ground. A third mill, upon a more extensive plan, was then built by the purchaser. After Braxton's death his widow claimed dower in the mill, but the chancellor decreed that she was not entitled to it.

Warden, for the appellant, that the widow was entitled to dower in the mill, cited *Baron & Feme*, 90, 92; Co. Litt. 31.

By Court. The court is of opinion that the appellant is not entitled to dower in the mill, which was built by the purchaser, subsequent to the date of his purchase; but that she is entitled to be endowed of the site of the mill, and the fifty acres of land thereto attached, in possession of the appellee, estimated by the commissioners appointed in this cause, to be of the value of fifteen dollars per annum: Harg. Co. Litt. 32, note 8; Perk. sect. 328; 2 Bac. Ab. 368; and, therefore, the appellee is to be decreed to pay to the appellant five dollars per annum, beginning from the commencement of this suit and continuing during her life, in lieu of her dower in the said mill and fifty acres of land, with right to enter in case of default of payment for forty days after demand made, and with liberty to apply to the high court of chancery for future directions concerning the same.

The entry on the order book was as follows: "The court is of opinion that the appellant is entitled to dower, in the site of the mill with the fifty acres of land thereto attached, in the possession of the appellee, estimated by the commissioners, in their report in the proceedings of this cause, to be worth fifteen dollars per annum; and that there is error in so much of the decree aforesaid as relates to the said mill and land. Therefore it is decreed and ordered that so much of the said decree, as is above stated to be erroneous, be reversed and annulled, and that the appellee pay to the appellant her costs by her expended in the prosecution of her appeal aforesaid here. And this court proceeding to make such decree in lieu of that part of the decree aforesaid before reversed, as the said court of chancery should have pronounced, both decree and order, that the appellee pay to the appellant five dollars, as rent for each year since the commencement of this suit, for and during her life, in lieu of her dower in the said mill and fifty acres of land, reserving to the appellant a right to enter on and take possession of her dower in and thirds of the said mill and fifty acres of land, in case of the non-payment of all the rent which may be due, when a final decree is made by the said superior court of chancery in the cause, within such time as the decree shall direct; or in case the future rents shall not be paid annually, or within forty days after they or any of them become annually due and demanded; and liberty is reserved to the parties to apply to the said court of chancery for further directions as to enlarging the times of payment in cases of accident, or as to other matters concerning the same."

ENGLE v. BURNS.

[8 CALL, 463.]

EQUITABLE ESTOPPEL—CONCEALMENT OF TITLE.—Where a man stands by and sees another purchasing land to which he has a prior claim, and does not disclose his title, his concealment is a fraud, which will forfeit his title.

BILL for specific performance. Engle, by will dated twelfth January, 1760, devised as follows: "Touching such worldly estate wherewith it hath pleased God to bless me in this life, I give, devise and dispose of the same in the following manner and form: It is my will, and I do order, that, in the first place, all my just debts and funeral charges be paid and satisfied.

* * * * * I give unto my well-beloved son, Michael Engle, one hundred acres of land, adjoining Joseph Darke and John Humphrey's land. And the plantation I now live on, I give and bequeath the same to Mary, my beloved wife, during her natural life, and, at my wife's decease, the said plantation to be equally divided between my beloved sons, John Engle, George Engle, and William Engle."

On the twentieth of December, 1787, Michael Engle sold the tract of one hundred acres of land to William Burns, and gave him the title bond conditioned "that, if the above bounden Michael Engle, or his heirs, executors, administrators, do and shall well and truly convey and assign, or cause to be conveyed and assigned, unto the above-named William Burns, his heirs or assigns, a good right in fee simple unto a certain tract of land lying and being in the aforesaid county and state, joining the lands of John Humphreys and William Burns, containing one hundred acres more or less, it being the land on which the said Michael now dwells, on or before the third Tuesday in February next, free and clear of all incumbrances whatsoever, then the above obligation to be void, else to remain in full force and virtue."

Previous to this, Michael Engle had sold the land to Philip Engle, who was aware of the contract between Burns and Michael Engle for the purchase; but he never disclosed the fact of his own contract to Burns, and the latter paid the greater part of the purchase-money before he knew of this contract.

The answer of the defendant, Philip Engle, to the bill, stated that, on the fifteenth of October, 1787, he, through one Darke, purchased the life-estate of Michael Engle in the land, paid part of the purchase-money down, and since paid the remainder, except about twenty pounds; and took a deed for the land in 1788. He denied any knowledge of the bargain between the plaintiff and his brother, Michael, although he had heard of one; but this was not until after his purchase, and considerable payments had been made.

The answer of Michael Engle stated that he sold the land to the plaintiff for the consideration mentioned; that subsequently Philip Engle and Darke, who was to have part of the land, told the defendant that Burns meant to cheat him, and that he had better sell the land to them, which he did accordingly, Darke paying him twenty half joannes and a mare valued at one

hundred dollars; but he does not recollect the dates of the transactions.

The county court decreed a conveyance of the land to the plaintiff, and the defendant appealed to the court of chancery, where the decree was reversed in part, and from this latter decree, Engle appealed to the court of appeals.

Randolph, for the appellant.

Williams & Wickham, contra.

TUCKER, J. Burns brought a bill in chancery in Berkeley county court against Michael Engle and Philip Engle, setting forth, that in 1787, he purchased of Michael a tract of land now claimed by Philip, at the rate of forty shillings an acre, Pennsylvania money; for which he paid down forty-nine pounds five shillings; and, at the same time, gave his bond for one hundred and thirteen pounds, payable in September, 1788. And that he hath paid Michael, on account of the purchase, sixty-eight pounds nineteen shillings and eight pence, Pennsylvania currency, and is ready to pay the balance upon receiving a right to the land; which the defendant engaged to make him, as will appear by a bond dated the twentieth of December, 1787, executed by Michael for the above purpose, to which he refers, and prays it may be made a part of his bill. That notwithstanding Philip was well acquainted with his purchasing the land from Michael in a fair and honest manner, and knew of his paying money on account of the purchase, the defendants combining together to deceive, injure and cheat him out of the land, by buying and selling the same; the defendant Michael gave, to the other defendant Philip, a deed for the same, which is of record. All which is contrary to equity, etc. The bill, therefore, requires that the parties may answer the premises fully, and more particularly may set forth, whether the defendant Michael did not sell the land to the complainant for the sum stated, and with the knowledge of the defendant Philip? whether the complainant did not pay the consideration mentioned in the bill, with the knowledge of Philip? whether a bargain between the defendants did not take place subsequent to his purchase? and whether Michael did not give Philip a deed for the land? And prays for a conveyance, and general relief.

The defendant, Philip, answers, that on the fifteenth of October, 1787, Colonel Darke, in the presence and at the request of Philip, purchased the land of Michael, then in Michael's pos-

session, and to which, as he is advised, Michael had an estate for life, and that himself was entitled to the reversion in fee, under his father's will, to which he refers as part of his answer, at the price of forty shillings Pennsylvania currency per acre, and did actually then and there pay to Michael part of the purchase-money, but how much he does not precisely remember; and expressly charges that the whole purchase-money, except about twenty pounds Pennsylvania currency, is since paid to Michael: that Michael on the —— day of ——, 1788, in compliance with his bargain, conveyed the land to the defendant, Philip. That he does not certainly know of any bargain between Burns and Michael for the land; that he has, indeed, heard there was a bargain, but never heard the particulars; and expressly denies he ever heard one word about it until some time after his own bargain with and considerable payments made to Michael; and as expressly avers that neither he, nor Darke for him, ever made but one bargain, which was on the fifteenth of October, 1787, and denies all combination, and concludes with a general traverse.

It may save some trouble, in the future discussion of this cause, to remark, that the only charge of fraud contained in the bill against Philip Engle, or put in issue by it, is that he bought the land of Michael Engle; got from him a deed for it, after the complainant had agreed for the purchase; and paid a part of the consideration money with full knowledge of those circumstances. But the answer contains a full denial of both of those facts, and alleges a bargain made by Darke on behalf of Philip, and payment of part of the purchase money more than two months before the date of Burns's bargain, or the payment of any money by him to Michael. The substantial point which is thus put in issue is the priority of the contracts; the dates of which are precisely fixed; the one by the bond, which is made part of the bill; the other by the answer. The date of Burns's contract is not denied or put in issue; nor is it alleged in the bill that any previous agreement, sanctioned by the payment of money, or by any other act, ever took place between the parties. The subject of inquiry then is, whether Philip's bargain was, in fact, prior to the twentieth of December, 1787, and if so, whether it was a *bona fide* transaction between the parties?

Upon this point I shall examine the evidence.

William Darke says that after an unsuccessful overture to Michael to purchase the land on a former occasion, the latter came to his house, and told him he would let him have it for

less than he had before asked; that either on the fourteenth or fifteenth of October, 1787, he bargained for the plantation, and thinks he then told Michael that it was for his brother Philip, and that he must make him a deed for it; at which time he paid a part of the purchase-money, and was to pay the rest in April following; that Michael was to take a wagon with three horses in part payment, and the balance in money; that some considerable time afterward he heard that Michael had sold the land to Burns; that on his return from Alexandria, after the last mentioned period, he paid Michael a further sum of money, and in a few days or weeks after, he received the whole, except a small part left to pay a debt to Col. Morrow; that the bond he took of Michael for a conveyance of the land was made to Philip Engle, and that if he remembers right, he was a witness to it; that the bond was given up to Michael when he made the deed; that he has not, nor ever had, any interest in the land, and that, although he did believe, from reports, that Michael had made some bargain with Burns, he always heard, and believed it was after he had sold it to him, the said Darke.

A receipt dated the fifteenth of October, 1787, from Michael Engle to William Darke for part of the price of this land sold him, and an order from Darke in Michael's favor for four dollars paid by Henry Bedinger, are among the exhibits; the date of this order is by Bedinger fixed on the said fifteenth of October, 1787, and that he paid the same, as appears from his day book. The receipt is substantiated by the depositions of Michael Bigerly, Thomas Johnson, and John Hendricks, and corroborated by the testimony of Michael McCabe. Thomas Johnson also states that about the middle of October, 1787, Michael Engle came to Darke's house, where he then was at work, and asked him if he could make him a suit of clothes, and said that he had sold his plantation to Darke, about two months after the witness heard he had sold it to Burns. And John Darke says that Michael Engle told him of the sale to his father, about the same time.

To rebut this testimony, arising not only from the positive averment in Philip Engle's answer in a point responsive to the bill, and to the very gist of the suit, but from collateral circumstances in evidence, as well as direct testimony, there is not in the record a single piece of testimony, or any circumstance whatsoever, that I have been able to discover, except the answer of Michael Engle (which is not evidence against Philip, although it contains strong evidence for him, as to the payment

of twenty half joannes), and the vague reference to the year 1787, in the deposition of Robert Lowry. I am, therefore, perfectly satisfied that Darke's bargain with Michael Engle was actually in October, 1787; that he *bona fide* paid almost the whole of the purchase-money; that Burn's bargain was subsequent to that period, it being concluded on the twentieth of December, 1787, but not before. And consequently that the complainant has no equity against Philip Engle upon this point. The actual priority of Darke's purchase being thus, as I apprehend, fully established, I shall, before I proceed to the point insisted upon by the counsel for Burns, viz.: that Philip Engle had made himself liable, by countenancing the fraud of Michael, make one inquiry, namely: Had Burns, at any time, notice of Darke's prior purchase?

John Engle states that William Burns asked him something concerning the purchasing of some land of Michael Engle, and he told Burns that Michael had no right to sell the land which Burns was about to purchase; that he saw the parties together some time after, and heard Burns again propose purchasing land from Michael; that Michael gave the deponent an order on Burns for ten dollars, which he refused to pay, saying that when they concluded the bargain he would pay; which conversation happened some months after Darke's purchase for Philip.

If this fact be true, Burns, and not Philip Engle, was guilty of fraud, by endeavoring, in an underhand manner, to purchase from Michael what he had notice was already sold to Philip; and, in that case, the maxim, that he that doth iniquity shall not have equity, comes home to Burns.

I shall now consider the second point insisted on by the appellees, viz: That although Philip Engle's purchase should be prior in time to that of Burns's, his conduct in concealing his own purchase, and aiding Michael in drawing money from Burns in payment for the land, was fraudulent as to Burns, whose title, for that reason, is preferable in equity.

The rule laid down in the text of 1 Fonbl. 161, is that where a man who has a title, and knows of it, stands by and either encourages, or does not forbid the purchase, he shall be bound, and all claiming under him, by it; and this seems to be a just punishment for his concealing his right, by which an innocent man is drawn in to lay out his money.

The rule thus laid down supposes the party to be present at, or connusant of, the treaty in which the fraud is practised, and

encouraging the purchaser either in express terms, or by silence and concealment of his own title, to proceed in the purchase; and the cases of *Hobbs v. Norton*, 1 Vern. 136; *Hunsden v. Cheyney*, 2 Id. 150, which is the strongest case there cited; *Draper v. Borlace*, 2 Id. 370; *Arnot v. Briscoe*, 1 Ves. Sen. 95; *Raw v. Pote*, 2 Vern. 239; and *Berrisford v. Milward*, 2 Atk. 49, cited in support of the rule, all proceed upon those grounds. In *Beckett v. Cordley*, 1 Bro. 357, Lord Thurlow says: This court never binds a third person, but where there is notice of a treaty; and in *Ibottson v. Rhodes*, 2 Vern. 554, where a mortgage being asked by the agent of a person about to lend money on an estate, whether he had any incumbrance on it, answered he had not, the lord keeper ordered it to be tried at law, whether the agent told the mortgagee that his employer was about to lend money on the estate. In 9 Mod. 36, the party stood by and suffered a fraudulent treaty to go on. In *Clare and the Earl of Bedford*, an infant, nearly of full age, was bound because he engrossed the deed. That, says Lord Thurlow, was upon the principle that he knew of the transaction. In *Mocatta v. Murgatroyd*, 1 P. Wms. 393, the first mortgage was witness to the second mortgage, and was therefore postponed. So in *Berrisford v. Milward*, 2 Atk. 49, with this additional circumstance, that he promised the mortgagor to rely on his personal security. There is no case in the books, says Lord Thurlow, but where the party to whom the fraud was imputed was connusant of the treaty in which the fraud was practiced. In *Stiles v. Cowper*, 3 Atk. 692, where a remainderman in tail had, for six or seven years, received rent upon a lease for sixty-one years, made by his father, who was only tenant for life, during which time the tenant, at his own expense, had greatly improved the premises, the court declared that when a remainderman lies by, and suffers the lessee or assignee to rebuild, and does not by his answer deny that he had notice of it (as Philip Engle does in this case), all these circumstances together will bind him from controverting the lease afterward.

The rule laid down in 1 Fonbl. 162, note n, as cited from *Fox v. Mackreth*, 2 Bro. Ch. Cas. 420, is thus: If a man, by the suppression of a truth which he was bound to communicate, or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a full and correct representation of the fact, his claim shall be postponed to that of the person whose confidence was induced by his representation.

Having already said that I am fully satisfied that Darke's con-

tract in behalf of Philip Engle, concluded with his knowledge, and at his request, was at least two months prior to the contract between Michael Engle and Burns. If it shall appear from the evidence, that Philip Engle either stood by and encouraged, or being present, did not forbid Burns's purchase, or disclose his own claim; or that being applied to by Burns, or any one on his behalf, to know whether he had any claim or title, as Burns intended to make the purchase if no prior title or bargain existed, he did either deny that he had any prior claim, or conceal the bargain made in his behalf by Darke, from the knowledge of Burns, such conduct would bring him within one or both of these rules; and if charged in the bill, and put in issue and proved, will postpone his claim to that of Burns.

But I can find no such allegation in the bill, the charge in which is confined to his supposed fraud in obtaining the lands in pursuance of a bargain made subsequent to that of Burns. These charges are, in their essence, as materially different as a charge of horse-stealing in an indictment, and a charge of concealing a horse thief. And to my apprehension, evidence of the one in support of the other of these charges, is equally inadmissible, as if the prosecutor of the supposed horse thief were to offer evidence to support the charge that he had received the principal felon in his house. And if the maxim be true, that fraud shall never be presumed, but must be proved, I presume that it is equally necessary it should be specially charged in the bill, that the defendant may deny it by averment; for otherwise, the fact of notice or of fraud, will not be in issue: Mitf. 216. And would it not be a breach both of law and equity, to condemn a man in a heavy penalty, for a fraud disclosed in evidence, but not charged or put in issue by the pleadings between the parties? Suppose, for example, the fraud that is disclosed in the evidence, be proved only by one witness. If the defendant had been charged with this fraud in the most direct terms by the bill, and had answered and denied the charge with proper averments in his answer, the defendant could never have been condemned upon this evidence. But if we dispense with this strictness in the pleadings, a defendant can never be safe, because he may be condemned on collateral evidence of a fraud, with which not having been charged, he could not know it was necessary to defend himself against it.

But if it be supposed that this fraud is charged in the bill, then it is as clearly denied by the answer, which expressly denies all fraud and combination, and concludes with traversing all the matter alleged in the bill. Then how is it proved?

There is not one tittle of evidence to show that there was ever any communication between Philip Engle and Burns, about the land, either before or at the time of the bargain, or any application from Burns, or any person on his behalf, to Philip for information, or any denial or concealment of his claim at any time whatsoever, unless such concealment (for there is not a shadow of proof of a denial), be inferred from the evidence of George Burns, who says that some time before Michael Engle removed from this country, he and Philip came to the house of Burns and wanted flour, or some other articles (but whether he obtained them or not, he does not say). That Burns observed to them that he was frequently paying sums which he might forget; to which Philip replied that he knew of some money (not saying how much), which Burns had paid Michael in Martinsburg, and the witness understood it was in payment of land which Michael had sold Burns. This witness could not remember the year in which this conversation happened; but Frederick Blue speaks of Michael's going to Burns for a barrel of flour about the first of May, 1788, which possibly was the same time; and, if so, about four months after Burns had made his bargain for the land.

This is the only evidence in the record, direct or indirect, between Philip Engle and Burns. It is not in proof that Burns at that time paid a farthing, or supplied Michael with the flour, or any other article to that amount. Taking the evidence as it relates to the money paid at Martinsburg to Michael, it does not appear but that Michael might have told him of it, or that he might have known it from a thousand other sources, without being present at the payment; nor does the amount, whether a shilling or ten pounds or any other sum, appear in any part of the evidence.

Is it possible, upon this evidence, to bring the conduct of Philip, upon this occasion, within either of the rules which I have cited from Fonblanque? I think it impossible to do so.

But let it be supposed that, instead of this vague and uncertain testimony, the evidence had been, that Philip went with Michael to the house of Burns, and that Burns had paid Michael, in the presence of Philip, ten pounds—Philip all the while concealing his claim to the land. What is the measure of punishment which equity would decree against Philip in such a case, he being before that time a *bona fide* purchaser, without notice, and for a valuable consideration paid for the land? Would equity, for this act of concealment, decree that

he should lose his land, although worth a thousand or ten thousand pounds?

If equity would, in such a case, decree such a punishment, I should think that she would hereafter abandon her claim to the title of mild. Her punishments, on the contrary, may be considered as far exceeding those of our present or former penal code. If Philip Engle had robbed him on the highway, or had broken open his house in the daytime and had stolen his money, our criminal courts would now inflict a punishment comparatively light to that of a forfeiture of, perhaps, all his lands. Such a punishment would not, according to the principles of our law, be according to the degree of the fault and the estate of the defendant.

Let it be remembered that I am now considering the case of the concealment as it relates to this time four months after the bargain, and to the subject then in hand—the payment of a sum of money.

The most that equity could do, under those circumstances, would be to decree that money to be repaid, with interest; and to make Philip liable for it in case Michael should not be able to do it.

Such, then, as it respects Philip, is the utmost that this court would decree against him had the fraud been put in issue and proved. If he has any money of Michael's in his hands, that ought to be paid over to Burns; and the court might proceed to decree him further relief against Michael. Of this, however, it will probably be unnecessary to say more.

My opinion is that the chancellor's decree should be reversed; that the bill be totally dismissed as to Philip, with costs; and that the court might make such a decree against Michael, as to afford the complainant all the relief against him that it may be in the power of the court to afford him. In this opinion I am the more confirmed by the deposition of John Engle (which I have already noticed), who says that he told Burns of Darke's bargain for the land before Burns agreed with Michael for it. From that moment he was chargeable with the fraud which he now imputes to Philip.

ROANE, J. In the view I have taken of this case, it is unnecessary to inquire minutely whether the purchase of Philip Engle, or that of Burns, was prior in point of time? I think, however, that throwing out of the case the answer of Michael Engle, and the testimony derived from him, the testimony preponderates in favor of the priority of Philip Engle's purchase. Nor do I

deem it material to inquire at what time the purchase of Burns became known to Philip Engle, or whether, at such time, he, Philip Engle, had paid the whole of his purchase money, or not? This I go upon, that he, Philip Engle, claiming by purchase from Michael Engle, stood by, and concealed his purchase; suffered Burns to go on, without objection, and conclude his purchase. Nay, more, was active in leading Burns on to pay up his purchase-money. To make the case still stronger, he, Philip Engle, received, as it were, a consideration for one of these payments by Burns, he being thereby released from a suretyship for Michael Engle. The testimony of George Burns shows that Philip Engle encouraged Burns to pay money on account of the land in an address to Burns himself. I say on account of the land, because it is neither shown nor pretended that any money was due from him on any other account. The evidence of George Burns is clear enough, that the money was paid on account of the land. The word "understood" must be taken to be an understanding at that conversation, and for the parties themselves. The testimony of Slaughter and — Lowry shows that Philip Engle was instrumental in procuring such payments from Burns; and, if Burns were not actually present at the time, it is immaterial, if he had a knowledge of such conduct on the part of Philip Engle, as implied his assent to his (Burns) purchase, and a waiver of his own. The ground on which a man is bound, who has a title, and stands by, and either encourages or does not forbid a purchase, or the completion of a purchase (for I make no distinction between the two), is, that of an implied assent to such purchase: 1 Fonbl. 151. This assent is as much to be inferred from the encouragement to pay a small sum, as the whole purchase-money; for the purchaser inferring such assent from such payment, may reasonably go on thereafter to complete his purchase. To protect the first purchaser from the effect resulting from such partial payment, it is incumbent on him to show an intermediate prohibition of payments on his part, or retraction of such assent. This is not done in the present case; and whatever conclusion may result from the other depositions, that of George Burns will sustain the appellee on this principle. If under this principle, a penalty or punishment results to the person encouraging, by his concealment, it is better that it should fall on him than on an innocent man, thus drawn in, by him, to lay out his money; it is immaterial, in the eye of equity, whether injury has arisen from a suggestion of falsehood, or the concealment of truth

from a party having a right to a communication thereof. In a case like the one before us, the person induced or encouraged has certainly a right to be informed of the claim or right of the adverse party, if it be intended to be relied on.

These principles are too self-evident to need the support of particular decisions. Such, however, I apprehend, may be readily found.

The conduct of Philip Engle, thus tending in conjunction with Michael Engle to defraud a third person, being more than a mere concealment of facts which ought to be disclosed, and producing the actual benefit to Philip Engle, which is before mentioned, ought to be discountenanced in a court of equity. It actually ratified the purchase of Burns, though subsequent to his own purchase.

It now remains to inquire whether Burns, by these acts, acquired a life estate, or an estate in fee, in the premises in question? If Michael Engle took a fee under his father's will, it is unnecessary to inquire whether or not the reversion of Philip Engle would have passed to Burns by this conduct of Philip Engle, on a supposition that he, Michael Engle, took only a life estate. This latter inquiry is susceptible of various views, but perhaps need not be discussed. If decided, it ought, perhaps, clearly to appear whether Philip Engle undoubtedly understood Burns as having purchased the fee from Michael Engle; for, if not, if only a life estate was, or reasonably might have been understood by him to be purchased, it was not only unnecessary for him to have disclosed his claim to the reversion, but a forfeiture of such reversion by him for the concealment, would both seem too rigorous in a court of equity, and also, perhaps, be going beyond the principle pervading these cases, namely, that the purchase of the person encouraged or induced, is ratified. The case of *Watson v. Powell*, 3 Call, 306, seems, however, to render this inquiry unnecessary, and to settle the question that Michael Engle took under his father's will, and could consequently convey a fee. Whatever opinion I might have as to that case considered as a new one, however I might be disposed to doubt whether any great stress should be laid in inferring the intention of a testator from mere words, of course, from the formulary expressions of the scrivener, from words which exist in all wills whatsoever, and which would therefore prevent, in almost all cases whatever, any such thing being conveyed by will as an estate for life, except such estate be expressly limited therein. (I speak

now without reference to the act of 1786.) I deem myself bound by that decision, and shall not attempt to disturb it. It is a very great evil that the rules of property should be perpetually fluctuating and uncertain.

As to the matters put in issue in this case, the bill calls on the defendant to say whether he, Burns, did not pay his purchase-money with the knowledge of Philip Engle? This is a point to which Philip Engle does not choose to answer; but it is certainly charged in the bill, and put in issue, and is the turning point in the cause.

As to an express charge of fraud, it is enough to charge fraud, by charging circumstances which involve fraud. There is some little obscurity in the bill upon this subject with relation to the words "and that by the knowledge of Philip Engle," whether they are referable to the previous or subsequent question (here a reference was had to those questions, from the record): I infer, however, that they refer to the former, because such words would be absurd, if applied to the succeeding question.

As to John Engle's deposition it does not appear from it that Burns, when he purchased, knew of Philip Engle's purchase.

My opinion, therefore, is that the appellant do convey the land aforesaid to the appellee, and deliver up possession thereof, and account for the profits.

FLEMING, J. Michael Engle, without the least regard to principle, first sold the land to Darke on behalf of Philip Engle; and afterward to Burns; who was imposed upon both by Michael and Philip. For Philip knew of the sale to Burns; was present when part of the purchase-money was paid; and industriously concealed his own prior contract. The consequence is, that Philip's claim must be postponed to that of Burns's. For if a man stands by, and sees another purchasing land to which he has a prior claim, and does not disclose it, his concealment is a fraud, which forfeits his title: 1 Fonbl. Eq. 151; I am, therefore, of opinion, that there should be a conveyance of the land to Burns.

CARRINGTON, J. Philip Engle connived at the sale to Burns; and was present when several payments were made, without disclosing his own claim, which must therefore be postponed to that of Burns's. For the concealment was a fraud, which forfeited his title. I think, therefore, that there should be a decree for a conveyance of the land to Burns.

LYONS, President. Burns is entitled to a decree for a conveyance of the land; and the following is to be the entry:

“ The court is of opinion, that so much of the decree of the high court of chancery, as reverses that part of the decree of the county court, which ordered the appellant to convey the land in controversy in fee-simple to the appellee, and directed that he should only convey all the right in the land and premises which he derived from the defendant Michael Engle, to the appellee, is erroneous; that the said decree of the high court of chancery is also erroneous in this, in not directing an account to be taken of the moneys stipulated to be paid by the appellee for the purchase of the said land, and actually paid by him, that a decree may be made thereupon according to equity, for the benefit of the appellant so far as he shall appear entitled thereto; but that there is no error in the residue of the said decree. Therefore, it is decreed and ordered, that so much of the said decree of the high court of chancery, as is hereby declared erroneous, be reversed, and annulled; that the appellant forthwith convey the said land to the appellee in fee-simple, with warranty against himself, and all persons claiming under him; that he also forthwith deliver possession thereof to the appellee; that an account be directed to be taken of the purchase-money aforesaid, for the benefit of the appellant, so far as he shall appear entitled thereto, according to equity; that the land aforesaid be held subject to any balance which may be found due to the appellant; that the rest of the said decree of the high court of chancery be affirmed; and that the appellant pay to the appellee, as the party more substantially prevailing in this court, his costs by him about his defense in this behalf expended.”

BRANDER v. JUSTICES.

[5 CALL, 548.]

MANDAMUS TO PERFORM A PUBLIC DUTY. — Where a duty to erect a bridge was imposed upon the county court by statute, a mandamus is the proper remedy to compel that court to erect a bridge across a public road.

MANDAMUS to compel the county court to erect a bridge across a public road. This duty, among others, was imposed on the county court by statute, and the principal question in the case, was as to the right to issue the mandamus compelling the county court to discharge its duty in this respect; the reasons offered against the application for mandamus were: 1. That if the plaintiff had a right to redress; he had a different specific

legal remedy by appeal or *supersedeas*; 2. That an order of the county court refusing to let the repairs of the bridge, was made in the exercise of their judicial authority, and for this reason the court had no power to award the mandamus. From the decision refusing the mandamus, Brander appealed to the court of appeals.

Hay and Wickham, for the appellant contended, that mandamus was a proper remedy, notwithstanding he had a right of appeal: 3 Bl. Com. 110; 2 Str. 1082; 3 Bac. Ab. 534, 535; 1 Bl. Rep. 640; 3 B. L. Com. 65. The court being bound to build the bridge, and the law being peremptory, there was nothing left to the discretion of the court, and even if it lay in their discretion, they were compellable by mandamus to exercise it properly: 4 Burr. 2188. Wherever there is a public duty to perform, and the individual who ought to perform it will not, a writ of mandamus lies. The authority of the county court was not judicial, but a mere power to do a particular thing, which not having been exercised when it ought, a mandamus to compel the exercise was a proper remedy. Brander was not, strictly speaking, a party to the decision in the county court, and therefore could not appeal as a matter of right.

Randolph, contra. The county court had a discretion in the matter, and consequently their judgment was conclusive, unless some abuse be shown. The question was judicial; and a mandamus does not lie to a point of record: 1 T. R. 404; 3 Com. Dig. 28.

The party might have appealed, and therefore a mandamus did not lie because he had another remedy.

TUCKER, J. That the district court erred in refusing the mandamus for the reason assigned by them, if I had before entertained a doubt, it would have been removed by the authority cited by Mr. Hay, from Co. Litt. 39, a. That in every judgment there must be three persons: *Actor, Reus et Judex*. The second person, a defendant, was wanting in this case; and, therefore, in my opinion, the order of the court was no judgment. Consequently, that order was not made by the court in the exercise of their judicial authority; but in another character, to wit, as commissioners of police for the county.

Our constitution, arts. 13, 15, gives the county courts authority, and imposes duties foreign from those of a judicial nature. They are to recommend militia officers, justices of the peace, sheriffs and coroners. to the executive. The law imposes on

them a multitude of duties of the same nature. They are to lay out roads, build bridges, authorize ferries in certain cases; permit the erection of mills, license tavern-keepers, build court-houses, jails, etc.; and finally to impose a levy upon the liabilities in their counties for the purpose of defraying all expenses incurred by the court, under the authority of any law. These are the functions of commissioners of police, and not of a judicial court. The first reason assigned for cause why a mandamus should not issue, is not more satisfactory to me than the second; and although the district court have not assigned that also as a ground of their refusal, I think it ought to be noticed.

“Any person thinking himself aggrieved by the judgment, or sentence, of any county court, in any action, suit or contest whatever, where the debt or damages is of a certain value; or where the title or bounds of land shall be drawn in question; or the contest shall be concerning mills, roads, etc., may appeal.” This clause, it is contended, gave the appellant a remedy by appeal. I conceive not. Here was no contest, no party defendant, no opposer of the motion. The words action, suit, or contest, run through the whole clause. There must be one or the other to give a right to appeal from the judgment or sentence of the court. A motion not opposed does not constitute either an action, suit, or contest, except in some particular cases provided for by law, and founded upon notice to a party against whom, or against whose interest, the motion was made. As in cases of motions upon replevin and forthcoming bonds, and others of a similar nature. In those cases there is a defendant so made by the notice; and, if he fails to appear, judgment goes against him by default for want of appearance. There is no parallel between such motions and that we are now considering.

The writ of mandamus was introduced to prevent disorder from a failure of justice and defect of police. It ought, therefore, to be used upon all occasions where the law has established no specific remedy; and where, according to justice and good government, there ought to be one: 8 Burr. 1267. The legislature, in the act concerning roads, have, in one case, expressly provided for its use. In others of like nature, where no other specific remedy can be had, it ought to be granted.

But the party applying for a writ of mandamus is not entitled to it, unless a proper case be previously shown to the satisfaction of the court. The case suggested to the district court, as appears from the rule to show cause, was, I conceive, such a case; but, if the matter contained in the bill of exceptions may

be relied on as furnishing a true state of the case, there was not only a suppression of truth, but an absolute *suggestio falsi* contained in the suggestion to the district court for the rule. The road, from the record exhibited in the bill of exceptions, does not appear to be a public road, nor a road leading to the courthouse of the county, which must be a public road (and which the justices are bound to open and to keep open and in repair), but a mere private way to and from the appellant's mill.

The mill, by the terms of the law, must have had a bridge over the pier-head, flood-gates, or any waste cut through or round the dam, built and kept in repair at the expense of the owner, and not of the county, even if a public road had been established across the dam. But the road (as far as appears by the record) was established only to and from the margin of the creek, and not across it. There is no record to show that there ever was a bridge built at the expense of the county, or afterward accepted by the court, as a public bridge. The motion to the county court was to repair, not to erect a new bridge, or accept the one already built. It was a mere private easement; and Brander might as well have called upon the court to repair the road over his dam, as over this bridge. The plaintiff, we are told by the bill of exceptions, proposed to examine witnesses, then in the district court, in support of his application for a mandamus. That court would, in my opinion, have erred egregiously, had it gone into the examination of witnesses. Roads, mills, bridges, etc., being established by matter of record, matter of record only could be admitted to prove whether the bridge was a public or private bridge. And if no other matter of record was produced than that contained in the bill of exceptions, I am of opinion that the district court ought to have refused the mandamus. The bill of exceptions proves these records to have been offered and read to the court, and although I am of opinion, for the reasons before given, that the court ought not to have refused the mandamus, for the cause assigned in their judgment, yet that their refusal was right upon the merits, as shown by the bill of exceptions.

ROANE, J. Although I concur with Judge Tucker in the general course of his reasoning, yet I think proper to make a few remarks upon certain facts of the case.

The judges below appear to have denied their own jurisdiction in cases of this kind; but the eighth section of the act of assembly concerning roads, provides for a mandamus expressly, and therefore the district court was clearly wrong upon that

point. But with respect to the facts of the case, the records show that the road on each side extended to the branch only, without crossing it, so that the intervening space was no part of the road, had it even been a public one; and, therefore, there was no ground to apply for the erection of a bridge over it, at the expense of the county.

But in order to get over this objection, it was urged that Jackson first, and Brander afterward, was appointed overseer of the road. This, however, instead of helping the case, shows that the road was never considered as a public one; for no other hands were assigned to the repair of it, but those of the owners of the mill; which proves that nobody else was interested in it. Parol evidence would have been improper, because the regular proof in such cases are matters of record, and there was no room for presuming that any were lost from length of time, or otherwise; for not more than fifteen years had elapsed, and no circumstances, or destruction of records is suggested, to lay a foundation for parol evidence. The whole case, therefore, stood upon paper; and upon the merits, I think, the mandamus was properly refused.

CARRINGTON, J., concurred.

LYONS, President. We all agree that a mandamus is in general a proper remedy; and I think it ought to have been granted in the present case. For the district court decided that they could not go into the evidence, because they had not authority to allow the writ. The testimony, therefore, was not heard, and consequently, I cannot pronounce that there was no ground for the application. All that I can say is, that the court, contrary to their own notion, had authority to award the process, and that they should now have liberty to do so, in order to enable them to hear the evidence, and decide upon the merits. But as a majority of this court is of a different opinion, the judgment is to be affirmed; and the following is to be the entry:

“The court is of opinion that the said district court ought not to have refused the writ of mandamus, for the reasons assigned by the said court in their judgment; but this court is further of opinion that the matters contained and set forth in the appellant's bill of exceptions, in which it is now presumed the whole merits of his case are fully stated, as the same could be made to appear by matter of record, did furnish a sufficient ground and reason for the said district court to have refused

the writ of mandamus prayed for; and that the same ought to have been refused, because the appellant did not show a sufficient cause to the court to entitle him to the benefit of the said writ. Therefore it is considered that the said judgment be affirmed, and that the appellees recover against the appellant their costs, by them, about their defense in this behalf, expended."

This case was cited and approved in *Ex parte Yeager*, 11 Gratt. 673, and in *Kelly's case*, 8 Gratt. 634.

CASES
IN THE
SUPERIOR COURTS
OF
NORTH CAROLINA.

COBHAM v. ADMINISTRATORS.

[2 Haywood, 6.]

PROMISE BY ADMINISTRATOR TAKING DEBT OUT OF STATUTE OF LIMITATIONS.—Where one of two administrators said, when a note of his intestate was presented to him: “It is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands shall be sold,” this was held sufficient to take the case out of the statute of limitations.

ACTION upon a note, and the statute of limitations pleaded. The note was executed and made payable before the war, and three years had elapsed since the day of payment.

Plaintiff’s counsel offered evidence of an admission of the debt within three years next before the commencement of the action; and, although this exception to take the case out of the statute had not been specially pleaded, yet it was agreed by counsel that the testimony should be admitted, such being the practice of the bar. From this evidence, it was shown that the intestate, during his lifetime, had acknowledged the debt, and that, after his death, the note was presented to one of the administrators, who said: “It is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands are sold.

Defendants’ counsel contended that an admission of the signature was not an admission of the existence of the debt; if the debt had been admitted, it amounted to a new promise, and the action should have been against the executor *jure proprio*: H. Bl. 108, 114. The admissions of one of two or more administrators cannot bind the others.

By Court, WILLIAMS AND HAYWOOD. Admission of the signature is not an absolute admission of the debt; but the admission of the signature, with the addition, that all his just debts shall be paid, is equivalent to saying that this debt, if a just one, shall be paid, which in ordinary cases would certainly avoid the act of limitations. Also, in ordinary cases, the admission of one of several defendants would avoid the act as to all: Douglass, 652, 653, and we can see no reason why the admission of one of several executors should not have the same effect; any one of the executors may pay a just debt, though barred by the act of limitations, if he will; for he is not bound to take advantage of the act of limitations. Such payment would be a good one, and he would be allowed it on a plea of *plene administravit* as to creditors, or in a settlement with legatees or next of kin. Then why not also bind the assets by his promise to pay it, if one of two executors should admit the debt, and be sued first and plead the general issue; that, in the case of unsealed instruments, would be good evidence of the debt, and supersede the necessity of proving the instrument on trial; then why not take it out of the act of limitations also. As to a new promise being the ground for an action against the executor only *in jure proprio*, he may possibly be sued that way, and be charged, perhaps, *de bonis propriis*; for it has been sometimes held that a new promise is not only evidence of the old debt, but also of assets to pay it, at least, it is so laid down in many of the old books; but that does not prove that the old cause of action is extinguished, and that no action will lie against the executor, as executor, after such new promise. With respect to the act of limitations, the bar does not proceed upon the idea that the old debt is extinguished; for an admission of the debt after the action commenced will avoid the bar: 2 Burr. 1099. The act was intended to operate where a presumption of payment could fairly be raised, from acquiescence for a considerable length of time, that the debt was paid, which presumption remains not after a recent acknowledgment of the debt. An acknowledgment, or new promise, gives not a new cause of action only to be used as a substitute for the old, but removes the presumption of payment, which is an obstacle opposed by the act to the plaintiff's recovery on the old cause of action.

Verdict was found for the plaintiff.

Upon the argument on the motion for a new trial, the question was raised, whether or not the promise was conditional, depending upon the sale of Holly Shelter, which had not yet been sold.

By COURT. In this conversation there are two branches; the one admits the debt if it be a just one, the other relates to payment to be made out of a particular fund. All that is material, as to the act of limitations, is the admission of the debt, for upon that the law says it shall be paid out of the personal estate, and it is to no purpose for the executor to say he will pay out of the real, over which he has no control. Here is no evidence to impeach the justness of the debt. His signature may well stand as evidence of that originally, till the contrary be shown, though the signature alone may not be evidence that it is a subsisting debt.

Motion for a new trial refused.

BLACKLEDGE v. SIMPSON.

[2 HAYWOOD, 20.]

EXCEPTIONS TO AN AWARD.—There are two modes of taking an exception to an award; one, by what appears on the face of the award itself, as that it does not comply with the requisites of law for constituting a good award; the second may be for matters extraneous to the award, as for misbehavior of the arbitrators.

DUTY OF ARBITRATORS.—Arbitrators must pass on all that was particularly referred to them, but their award need not specify each particular; it is sufficient if the general result show that every matter referred must have been considered and decided.

IN WHAT SENSE AN AWARD IS MUTUAL.—An award must be mutual; the meaning of which is, that the award must not leave him, who is to pay, liable to be sued for the same cause for which he is awarded to pay.

THE case came before the court upon exceptions to an award. Complainant filed his bill stating that there were several settlements of accounts between complainant and defendant at different times and balances struck, for which the complainant had given bonds and mortgages; that there were many errors and unfair items in each settlement; that Simpson had recovered judgments against complainant, and prayed that the accounts might be opened and the errors rectified. Simpson pleaded the account stated and denied the errors mentioned in the bill.

The matters in dispute were referred to arbitrators who awarded that the first settlements were final; that a smaller balance was due from Blackledge than that found by the parties, and that this sum should be paid to Simpson.

Blackledge then excepted to the award on the grounds: 1. That the arbitrators had not given any award with respect to the errors complained of in the bill; 2. That the arbitrators refused to receive any evidence of the errors alleged in the bill; 3. That the award was not mutual.

By COURT. There are two modes of excepting to awards; one for what appears on the face of the award itself, as that it does not come up to the requisites of the law for constituting a good award; the second is for matter extraneous, as for misbehavior of the arbitrators. The first and the third of these objections are of the first sort, the second of the latter sort. The first objection amounts to this, that the arbitrators have not passed upon all that was particularly referred to them, and if this appear upon the face of the award, it is not a good one. They have awarded that the first settlements were final; that is equivalent to saying that the settlements ought not to be disturbed or opened, and this they could not determine without examining into the errors complained of to see whether in reality there were any errors or not; it was not necessary they should state each complaint of error, and say it was ill-founded; they have stated enough to show that they have considered these complaints, and overruled them, and that is enough. As to the third exception, to be sure the rule is that an award must be mutual. But the meaning of that is that the award must be so constructed as not to leave him, who is to pay, liable to be sued for the same cause for which he is awarded to pay; but here it sufficiently appears by looking into the bill, pleadings, reference and award for what cause they order this sum to be paid, and then it follows that if he should be again sued for the same cause, he may produce these proceedings, and show he has already discharged himself of these demands. It is not necessary they should have awarded anything to be paid or done by Simpson. The Cobbler's award reported by Burrow was held good; it awarded a sum to be paid for the first breach of the law, and this was upon the principle that the word "for" sufficiently identified the cause which was the consideration of the payment. As to the second objection, that is for the misbehavior of the arbitrators, and must be made out by proofs.

A day was given to make out the proof, and on that day no proof being adduced to substantiate the exception, it was overruled, and a decree passed agreeably to the award.

See *Borretts v. Patterson*, 1 Am. Dec. 576, for a decision on the same point.

STATE v. MOODY.

[2 HAYWOOD, 31.]

DYING DECLARATIONS AS EVIDENCE.—On an indictment for murder the declarations of the deceased may be received in evidence, but then they must be the declarations of a dying man—of one so near his end that no hope of life remains—for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath; but if at the time of making the declarations he had reasonable prospects and hopes of life, such declarations ought not to be received. Therefore, in this case, declarations of the deceased were rejected made the day after he was wounded, six or seven weeks before his death.

INDICTMENT for the murder of one, Mason. Plea, not guilty. The attorney-general offered in evidence the examination of the deceased, taken upon oath and subscribed by him before a justice of the peace, the day after receiving the wounds and six or seven weeks before his death. It was offered as the declarations of the deceased.

By COURT. Declarations of the deceased have sometimes been received, but then they must be the declarations of a dying man—of one so near his end that no hope of life remains—for then the solemnity of the occasion is a good security for his speaking the truth, as much as if he were under the obligation of an oath; but if at the time of making the declaration he has reasonable prospects and hope of life, such declarations ought not to be received, for there is room to apprehend that he may be actuated by motives of revenge and an irritative mind to declare what, possibly, may not be true.

HAYWOOD, J. Though it may not be proper to receive this paper as containing the declarations of the deceased, it may be a question whether it may not be received as an examination taken on oath before a justice of the peace, pursuant to the act of assembly prescribed for such depositions in cases of felony; when regularly taken pursuant to the act, and the witness afterward dies, it may be read in evidence; more especially if the party to be affected by that testimony was present at the examination, as the prisoner was in the present case.

Badger, on behalf of the prisoner, contended that the deposition was not regularly taken, the deceased not having been sworn to tell the whole truth prior to his examination, but having merely sworn to the truth of the statements taken down.

STONE, J. I cannot think this paper is receivable at any rate; how is it possible a man can be a witness to prove his own death?

HAYWOOD, J., did not insist upon the admission of the evidence, so it was rejected.

PON'S EXECUTORS v. KELLY.

[2 HAYWOOD, 45.]

PRESENTMENT FOR ACCEPTANCE AND PAYMENT.—The indorsee of a bill is bound to present it in a reasonable time, first for acceptance, then for payment, and in case of non-acceptance or non-payment, to give notice thereof in a reasonable time to the indorser.

NOTICE WHEN GIVEN OR EXCUSED.—The indorsee can never support an action against the drawer without proving the giving of notice, or in case of a non-acceptance of a bill without proving that there were no effects of the drawer's in the drawee's hands; but this proof to excuse a want of notice can only apply to the case of a bill not accepted; it does not apply to an accepted bill or to a promissory note. If the maker of a promissory note be insolvent the indorsee must still give notice to the indorser.

WHAT DEEMED SUFFICIENT NOTICE.—As to what shall be deemed sufficient notice, the indorser must have notice from the indorsee that he cannot obtain payment, and that he looks to the indorser for payment.

ACTION to recover a sum of money due as a balance on the sale of a house; the declaration contained a second count on a note for the same sum indorsed by Kelly to Pons of which plaintiff could not obtain payment from the maker, Cox.

It appeared that the house was sold in April, 1793, and for the balance remaining unpaid, four hundred and fourteen dollars and fifty cents, the note was indorsed. About three weeks afterward, Pons, by his agent, Porrie, applied to Cox for payment, which was refused. In the fall of that year Porrie met Kelly and told him of Cox's inability to pay the note, and said that Pons would look to Kelly for the money. Kelly replied that Pons had made the note his own by keeping it so long. In the fall of 1794, defendant called at plaintiff's, asked for the note and said he would try to pass it off. It also appeared that at the time of the indorsement, and when application for payment was made, Cox was insolvent.

The jury found for the plaintiff; whereupon defendant moved for a new trial.

Baker, for the plaintiff.

Davie, for the defendant.

By COURT. If an indorsee keeps the paper so long in his hands as to make it his own, *ex necessitate* it must be a discharge of the precedent debt though not so originally. It would be absurd to say he could keep the note and also recover for the precedent debt; the case cited admits it may become so *ex post facto*. It means that a note indorsed is not a discharge of a precedent debt unless agreed to be so, except in the case where the holder keeps it an unreasonable time in his possession, and then it may; and that this is fit to be left to the jury. In order, therefore, to determine whether the note in question be a discharge or not we must resort to the indorsement and the law upon it, and draw conclusions from them. The indorsee of a bill of exchange undertakes in reasonable time to present the bill for acceptance and then for payment; and in case of non-acceptance or non-payment, to give notice thereof in reasonable time to the indorser. The indorser can never support an action unless he performs all parts of this undertaking; he must prove the giving of notice, or in case of the non-acceptance of a bill, prove that there were no effects of the drawer in the drawee's hands; that is to say, if he or the payee means to resort to the drawer. But this proof in excuse of not giving notice only can apply to the case of a bill of exchange not accepted. For if it be accepted, that is full proof that the drawer has effects in the hands of the drawee, or that he has credit upon him. But such proof in excuse of want of notice can never be given in case of a note indorsed, for there the maker has accepted at the time of drawing or making the note, and the indorsee cannot say he had not effects of the drawer in his hands. As to the point whether notice is necessary in case of a promissory note, every reason which requires it in the case of a bill holds equally strong in the case of a note. The case of *Tindal v. Brown* is a case upon a note, so was that of *Russell v. Langstaffe*, reported by Douglas in the case cited from Kidd, 79. It is expressly stated that notice in case of a note is necessary to entitle the holder to his action. These cases which state the law to be otherwise are old cases decided before the law respecting bills and notes had advanced to its present degree of perfection. As to what shall be deemed sufficient notice, the indorser must have notice thereby from the indorsee that he cannot obtain payment, and that he, the indorsee, looks to the indorser for payment. The argument that

the insolvency of the maker of the note would be an excuse to the indorsee for not giving notice, seemed to be of some weight when first offered, but upon consideration it has none. The indorsee ought to give notice, for perhaps the indorser may procure payment by the help of friends or by some means unknown to the indorsee and not within his power.

Kidd, 79, abridging the cases in the books, says, if the maker of the note be insolvent, the indorsee must give notice to the indorser; the same is laid down in Bl. Rep. 747. And Lee, arguing the case of *Russell v. Langstaffe*, said that Lord Mansfield had nonsuited many plaintiffs at *nisi prius* for want of notice, although it were proved that the maker of the note or drawee of the bill was insolvent; and in the case of *Goodall et al. v. Dolly*, 1 T. R. 712, where the drawee and drawer were both insolvent, and the counsel, to excuse the want of notice, insisted upon that circumstance, it was answered to be perfectly clear that the law was otherwise; and that answer prevailed so far with both the counsel and the bench, that the point was instantly abandoned, and no more notice taken of it. With respect to what shall be reasonable, it must be laid down in general, that the party shall give notice as soon as he conveniently may, all circumstances considered, but the court will say what time is reasonable; and if the jury allow beyond that time, the court will set aside their verdict; otherwise one jury might think one time reasonable, another another, and so on, *ad infinitum*, so that there would not be the least certainty.

Verdict set aside and new trial ordered.

In regard to the necessity of notice when the bill had not been accepted, and there were no funds in the hands of the drawee, it is stated as follows in Redfield and Bigelow's Leading Cases upon bills of exchange, etc., 443: "It has been held not to effect the question of the necessity of notice in this class of cases that the bill had been accepted. Notwithstanding the fact of acceptance, the drawer is not entitled to notice of non-payment, if he had no right to draw. *Hoffman v. Smith*, 1 Caines, 160; *Hill v. Norris*, 2 S. & P. 114; *Foard v. Womack*, 2 Ala. 368, 371; *Gillespie v. Cammack*, 3 La. An. 248; *Kinsley v. Robinson*, 21 Pick. 327; *Mobley v. Clark*, 28 Barb. 390; *Valk v. Simmons*, 4 Mason, 113; *Allen v. King*, 4 McLean, 128; *Rhett v. Poe*, 2 How. 457; and see *Sargent v. Appleton*, 6 Mass. 85.

But a contrary view has been entertained: See *Pons v. Kelly*, 2 Hay. 45, 47; *Richie v. McCoy*, 13 Sm. & M. 541; see also *Campbell v. Pettingill*, 7 Greenl. 126; *English v. Wall*, 12 Rob. La. 132; *Orear v. McDonald*, 9 Gill, 350, 358."

In regard to the contents of notice, Story, J., giving the opinion of the court in *United States v. Carneal*, 2 Peters, 543, says: "A suggestion has been made at the bar that a letter to the indorser, stating the demand and

dishonor of the note, is not sufficient unless the party sending it also informs the indorser that he is looked to for payment. But when such notice is sent by the holder, or by his order, it necessarily implies such a responsibility over. For what other purpose could it be sent? We know of no rule which requires a formal declaration to be made to this effect. It is sufficient if it may be reasonably inferred from the nature of the notice." The prevailing rule is, therefore, that the mere fact of giving notice to the party implies that he is looked to for payment. *Warren v. Gilman*, 5 Shep. 360; *Cowles v. Harts*, 3 Conn. 517; *Townsend v. Lorraine Bank*, 2 Ohio St. 345; *Burgess v. Freeland*, 4 N. J. 71; Story on notes, sec. 353. It is now decided that it is unnecessary to accompany the notice of dishonor of a foreign bill of exchange with a copy of the protest: *Hooker v. Anderson*, 21 Wend. 372; *Goodman v. Harvey*, 4 Ad. & El. 870; *Wallace v. Agry*, 4 Mason, 336; but information of the protest should be sent if the party to whom notice is transmitted resides abroad. *Rogers v. Stephens*, 2 T. R. 713.

FREELAND v. EDWARDS.

[2 HAYWOOD, 49.]

INTEREST, WHEN ACCRUES.—Where money is payable on demand, interest does not accrue until a demand is made; when no time is mentioned the money is payable immediately without a demand, and interest accrues immediately.

ACTION of debt upon a bond conditioned for the payment of a certain penalty in which no time was mentioned. The question was, from what time interest should be calculated.

HAYWOOD, J. The rule is fixed, that bonds payable without any certain time mentioned are payable *instantly*, and bear interest immediately from the delivery.

Davie, for the defendant, requested the court to give the reasons for such rule, in order that they might be examined to see whether the rule was well founded or not.

HAYWOOD, J. The reason of the distinction is this: In case of a bond payable without saying when, the obligee has not to do any act either to entitle himself to the action, or to the interest; in case of a bond payable on demand, he undertakes to make a demand, otherwise the words, on demand, have no meaning; and if a demand is to be made, it is for some purpose; it is not to entitle himself to the action, it therefore must be to give a right to demand interest. The act of assembly proceeds upon this very principle; it says a note payable on demand shall bear interest from a demand made. When speaking of an account signed, it says interest shall accrue from the signature;

yet, on both instances, an action may be brought immediately without any formal demand. But if we could not give the reason of the decision, we know that the rule is so established; it is, therefore, far better to make it the standard of our adjudications than to render the law again uncertain by departing from it.

Judgment for plaintiff, with interest from the date.

STATE v. PUGH.

[2 HAYWOOD, 55.]

CONVICTION OF ONE OF SEVERAL FOR RIOT.—In an indictment for a riot, if one of several be convicted, and the others are not yet arrested, he is subject to punishment, although the others may afterward be acquitted, because he is estopped by the verdict to deny his guilt.

INDICTMENT for riot. There were five defendants named in the indictment, two of whom were now tried, and one found guilty with the other three, and the second acquitted. Of the remaining three not before the court, one was dead, another a resident of South Carolina, and the third in this state, but not arrested.

The attorney-general moved for judgment.

HAYWOOD, J. I have a doubt whether judgment can now pass upon the defendant, who is now convicted. I will look into the books. Let it be again moved to-morrow.

On the following day the motion was again made.

HAYWOOD, J. My doubt yesterday was, that as two of the defendants not brought into court were yet alive, and as it is not impossible but that they may still be brought in and tried and acquitted, it still remained doubtful whether the prisoner now convicted might not be legally innocent; for the acquittal of these two, together with the acquittal of the one, which has already taken place, would leave but two to be guilty, and so not a riot. I have looked into 1 Str. 193, *The King v. Kennersley*, and into 2 Burr. 1264. In one of which cases the objection was stated that arose in my mind, and was there answered by saying that the verdict estopped the party to say he was not guilty, and the court deemed it a sufficient answer. Upon this authority I shall proceed to judgment against the defendant now convicted.

Judgment of fine, and imprisonment for three months.

At common law a riot cannot be committed by less than three persons; and, therefore, if several be indicted for riot, and the jury acquit all but two, they must acquit those two also, unless it be charged in the indictment and proved that they committed the riot together with some other person not tried in that indictment: 2 Hawk. c. 47, s. 8; *United States v. Cole*, 5 M'Lean, 513; *State v. Brooks*, 1 Hill (S. C.) 361; *State v. Eagan*, 10 La. An. 698. But where two are indicted for a riot with others, the conviction will be valid, though the others never come to be tried, or die before the time of trial: Poph. 641. Where there is an indictment against three for a riot, and a verdict of guilty as to one, and not guilty as to the others, a judgment cannot be rendered on the verdict against him found guilty: *Turpin v. State*, 4 Blackf. 432. An indictment for a riot against three is supported on the separate trial of one by proof of a riot in which he and two other persons joined: *Commonwealth v. Berry*, 5 Gray, 93.

NORTH v. MALLETT.

[2 HAYWOOD, 151.]

PAYMENT, HOW APPLIED.—When notes are received by a creditor as a payment, the debtor should be credited with them from the time of receipt, to be applied in the first place to the interest and then to the principal as other payments; otherwise when the creditor makes them his own only by delay.

WHAT IS A LEGAL TENDER.—It is not a legal tender to say: "here I am ready," the tenderer must have the money ready also.

ACTION for money due on two notes payable January, 1784. It appeared that payments had been made in part by two notes in 1783; that there were other payments from time to time; and in 1785 a payment of the balance of the principal, when an offer was made to pay all that was then due, if the plaintiff would credit defendant with the amount of the notes. This plaintiff refused to do.

It was stated by counsel that upon a calculation made by agreement, on the twentieth of May, 1785, when defendant offered to close the accounts, three hundred and twenty dollars and sixty cents, was found due as interest, and that to calculate interest on that sum would be giving compound interest. The method adopted in ascertaining this sum was to calculate interest on the principal sum till the time of settlement, and the interest on the several payments to the same time, and then strike a balance. That the payments made at different times amounted to more than the principal, so that this balance found due on the twentieth of May, 1785, must be considered as interest merely. Counsel urged that this mode of determining interest prevailed at the time the parties contracted, and should now be adhered to.

By Court, HALL, J. The payment ought in the first place to be applied to the discharge of the interest accrued, and if a balance of payments remains, then to deduct it from the principal. If the plaintiff received the notes as payment, the defendant should be credited from the day of the receipt, otherwise it is, if he only made them his by delay and keeping them in his possession. The defendant may stop interest when he pleases, by tendering the principal and interest, but it is not a legal tender to say, here, I am ready; he must have the money ready also.

MURPHY v. GUION.

[2 HAYWOOD, 162.]

ACTION FOR MESNE PROFITS, WHEN MAINTAINABLE.—The action for mesne profits does not accrue until possession is given after judgment in ejectment; and from that time only the statute of limitations begins to run.

JURY CANNOT GIVE VERDICT AGAINST LAW.—Where the law is clearly on the side of one party, and a verdict given against him, the court will grant a new trial, though several juries have found verdicts for the other.

ACTION of trespass for mesne profits. The case now came before the court on a motion for a new trial.

JOHNSTON, J. As to the first ground on which it is moved for, namely, that the statute of limitations should have protected the defendant for all but the last three years, it is not tenable. Judge Buller, it is true has said so, and it has been followed and copied into other books; there is, however, no adjudged case to that effect, and I do not consider myself bound by the *dictum* of any judge, however respectable. The reason of the thing is against the position. The plaintiff cannot bring his action till after the judgment in ejectment, and possession delivered or obtained in consequence of it. And shall he be barred for not bringing his action in time, when the law itself for that time prohibits the bringing his action? It would be absurd to say so; the direction given to the jury was proper. As to the other ground, evidence has been received and damages given for cutting down the trees, when no charge for the cutting down of trees was laid in the declaration. Such evidence ought not to have been received, although the defendant did not object to it. The verdict is therefore improper and unjust, being founded on evidence which was not admissible. He

has had a new trial before, but still I think he ought now to have one for the cause alleged. Let the verdict be set aside, but the plaintiff may have a rule to show cause why the declaration should not be amended.

Subsequently, plaintiff was permitted to amend his declaration by a count for the cutting down of trees, and the defendant to add to his plea that of *liberum tenementum*.

EELBECK v. GRANBERRY.

[2 HAYWOOD, 232.]

UNDUE INFLUENCE IN MAKING WILL.—Where any influence has been used to induce the execution of a will, the jury should decide whether it was by fair and reasonable means, or by unfair and fraudulent ones; in the former case they should find in favor of the will, in the latter against it.

SIGNATURE AND ATTESTATION OF WILL.—The signing of a will may be proved by proof that the testator acknowledged it, although the name or signature, or handwriting was not before him, and though the paper lay at a distance on the table. And the witnesses may attest at different times, so it be in the presence of the testator.

APPEAL from the county court. An issue, of *devisavit vel non* was made, pursuant to an order of the county court, to determine whether an instrument offered for probate was the last will of Henry Eelbeck. A verdict was found in the affirmative, and an appeal taken to this court.

In proof of the execution of the will, one witness testified that he saw it signed by the testator, and witnessed it in his presence; that the other witness came into the room the next day, and the will was produced, handed to the testator, and then carried to the second witness, who asked the testator if that was his act for the purposes within mentioned, and he answered yes; that, thereupon, the witness signed in the presence of the testator. The deposition of this second witness was read, and it corroborated the testimony already given.

TAYLOR, J. The requisites to the right execution of a will, are that the testator must be sane, and under no restraint or improper influence; that he must sign it; that it must be witnessed in his presence by two witnesses. There is a sound distinction between an honest and an unfair exertion of influence. Should a brother or sister, for instance, with whom the testator had been at variance, represent to him the facts which had led to it, in

such a way as to convince him that his displeasure was groundless, and by these means he should alter his former purposes, and make a will in her favor, or in favor of her children, to the prejudice of legatees provided for by a former will, that would not be cause for invalidating the latter. The jury will judge whether any influence has been used on the occasion of making this will; whether it was by fair and reasonable means, or by unfair or fraudulent ones, and decide accordingly. As to the point of execution, the two witnesses must each depose as to the signing, as well as to every other material fact. But the signing may be proved, from the witness having seen it written by the testator, or from having heard him acknowledge it. It is not necessary, if he acknowledged the signing, that the name or signature, or handwriting, should be before him at the time. If the paper lie at a distance on the table, and he acknowledged the signing without seeing it, it is sufficient. It is admitted, and so the law is, that the attestation of the witnesses may be at different times, so it be in the presence of the testator.

Verdict for the will.

WARD v. SHEPPARD.

[2 HAYWARD, 283.]

WASTE, WHAT CONSTITUTES.—Waste in this country is not to be defined by the rules in the English law in all respects, and from the situation of this country the cutting of timber for the purpose of clearing the land is not waste. What shall be deemed waste, must, in a considerable degree, be left to the jury upon the evidence; but if trees be cut not for the sake of clearing the land, but for sale, it is waste.

ACTION for waste alleged to have been committed in the dower lands of the widow, the defendant. Plea, no waste.

JOHNSTON, J. Actions of waste have been rarely brought in this country. I remember but one in my practice; that was against Holderness, formerly of Roanoke. And then it was decided, that waste in this country is not to be defined by the rules of the English law in all respects; for cutting timber trees for the purpose of clearing the lands, was not waste here, though it was so in England. If lands are leased to a lessee in an uncultivated state, he must of necessity have the power to clear, otherwise the lease would be of no profit or advantage to him. The same is the case of dower lands. It is proved here, or attempted to be proved, that the cleared lands were not enough

for her cultivation; and that the trees were cut down in contemplation of making a clearing. What shall be deemed waste, must, in a considerable degree, be in the discretion of the jury upon evidence. It seems to me the evidence rather proves that the trees were cut down for sale. The jury will consider whether they were cut down for this purpose or not; and if they shall be of opinion that this was the design, then they should find her guilty of the waste. If, on the contrary, the evidence proves they were cut down with a view to clearing the land, they should find her not guilty.

Verdict for plaintiff.

TROUGHTON'S ADMINISTRATOR v. JOHNSTON.

[2 HAYWOOD, 323.]

BY-BIDDING, WHEN FRAUDULENT.—Where a by-bidder under an agreement with the owner, runs up the price of property, and it is knocked down to him, he shall hold the property against such owner; because the agreement is fraudulent, and a party to a fraudulent agreement, cannot allege that it was fraudulent, to avoid its effect.

ACTION of replevin. The facts appear from the opinion.

HALL, J. The negro sued for, belonged to Troughton and was pledged to Johnston as security for a sum of money due from the former to the latter; four years intervened, and the negro was exposed to public auction by direction of Troughton, and bid off by Johnston. It is now said, the purchase by Johnston was a mere pretense, and by agreement between him and Troughton; the real object having been to sell to Kirk, a buyer of negroes, by running him up to a high price, and by bidding off for Troughton, if Kirk would not bid as high as the sum contemplated. Such agreement is fraudulent, and Troughton, a party to that fraud, cannot allege[it] for the purpose of avoiding the sale. But if the jury think a new agreement was made afterward, which revested the property in Troughton, then the sale has lost its effect.

STATE v. ROACH.

[2 HAYWOOD, 352.]

DEFECT IN INDICTMENT.—The court will quash an indictment when it is plain no judgment can be rendered in case of conviction, as where no day is stated as that on which the offense was committed.

INDICTMENT for knowingly passing counterfeit dollars.

Defendant's counsel moved to quash the indictment because there was no day stated on which the offense was supposed to have been committed, the day of the month being left blank: 2 Hawk. P. C. 258, 259.

By COURT. The defect which is pointed out, would be fatal upon a motion in arrest of judgment; and though it is true as has been argued, that the court has a discretion to quash or not, still it will quash where it is plain no judgment could be given in case of a conviction. Therefore, let this indictment be quashed, but the defendant shall not be discharged, but must be bound over to another term to answer the charge.

MITCHELL v. BELL.

[CONFERENCE REP. 17*]

CONTRACT VOID FOR WANT OF CONSIDERATION. — If an attorney promise his client, while the action is pending, to indemnify him against the consequences of it, the promise is without consideration, and an action cannot be maintained thereon.

ACTION on the case brought by Mitchell against Bell, an attorney, in which the jury found the following verdict: "We find that the defendant did assume, and assess the plaintiff's damages to thirty-two pounds six shillings and sevenpence, subject to the opinion of the court, on the following case: That in the year 1792, the defendant, as attorney at law, instituted a suit on behalf of the present plaintiff, Thomas Mitchell, against Dred Taylor, executor of Henry Taylor, deceased, — living William Lancaster, the other executor; that Dred Taylor afterward died, leaving Hardy Hunt and Henry Hunt his executors; that a *scire facias* issued at December court, 1792, against Dred

*These reports are by Cameron and Norwood. Outside of the state, they are sometimes cited by the names of the reporters; but in the subsequent reports of the state they are cited as Conference Reports, from the court of that name. The origin of the court was in this manner: In the year 1799 a law was passed directing the judges of the superior courts of law and equity to meet twice a year at the city of Raleigh for the purpose of determining all questions of law and equity arising and remaining undetermined upon the circuit. In 1801 a law provided: "That the said act, so far as it regards the meeting together of the said judges for the purposes aforesaid, be and the same is hereby continued in force for three years longer, and the said meeting of the judges shall be known by the name and style of 'The Court of Conference,' and the same shall be and continue for the time last aforesaid, under the same rules, regulations and restrictions as are provided in and by the said recited act." In 1804 an act provided for its continuance as a court of record, and that the judges should not only reduce their opinions to writing, but should deliver the same *viva voce* in open court, but this was altered by statute in 1810. In 1805, the name and style of the court was changed to that of the Supreme Court of North Carolina. See Laws of North Car. (ed. 1821), pp. 887, 941, 1020, 1039.

Taylor's executors, and made them parties to the said suit — living William Lancaster, the executor of Henry Taylor; that at the time the *scire facias* was returned, Bell, the defendant, who was the plaintiff's attorney in the aforesaid suit, promised the plaintiff, that in case he was nonsuited, thereby meaning cast, or in any way defeated, that he, the said Bell, would pay all costs; that the plaintiff was cast in the county court of Franklin, as appears by the record filed, and paid costs amounting to the sum of thirty-two pounds six shillings and sevenpence; and if the law is for the plaintiff, we find for the plaintiff; otherwise for the defendant."

This case was brought before the judges at their meeting this term for determination.

JOHNSON, J. The promise in this case, stated to be made by Bell, is founded on no consideration, therefore, I am of opinion the judgment should be entered for defendant.

TAYLOR, J. This action is founded upon an express promise made by the defendant, an attorney, that if the plaintiff should be nonsuited or cast in the suit, he would reimburse him all the costs.

Were this an action against the defendant for mismanagement of the cause or neglect of duty, it would have been unnecessary to have stated any other consideration than his undertaking the management of the suit. Every attorney receives the trust accompanied with responsibility to his client for any loss occasioned by his improper conduct; in such a case it might be necessary to examine how far he is liable where the loss arises, rather from error in judgment than from neglect or positive misconduct, and likewise to ascertain under which of these two descriptions the defendant's conduct ought to be classed. But in this case all such inquiries are useless, because if the defendant is liable at all he is so by virtue of his express promise, which would charge him without regard to the means by which the suit was lost.

As a consideration is indispensably necessary to support every assumpsit, it must be ascertained whether any exists in the present case; it is not pretended that the plaintiff paid anything at the time of the promise, or that he forewent any advantages or benefit that he might otherwise have had; the only consideration that can be possibly set up is, that he employed the defendant as an attorney, and in that character reposed confidence in him; but can that consideration be con-

nected with this promise? I apprehend not, because it was perfectly past and executed.

All the indemnity legally resulting from such misplaced confidence the plaintiff may enforce in another form of action; but to prevail in this it ought to be shown that the undertaking of the defendant was in consideration of the plaintiff's employing him. It is true that in some cases an assumpsit will lie, although the consideration is past, if there was a duty before; but in all of them the duty is coextensive with the promise. In this case the duty extended no further than a careful, diligent, and, possibly, skillful management of the suit; it did not go the length of making compensation to the plaintiff if he failed in his suit at all events, or under any possible circumstances. This promise was altogether without prejudice to the plaintiff or benefit to the defendant—the former would have been precisely in the same situation if the promise had never been made—the latter received no new confidence or reward for making it. It is within the idea of *nudum pactum* most completely. I am, therefore, of opinion that judgment be entered for defendant.

MACAY, J. This undertaking or promise being wholly without consideration is void.

Judgment for defendant.

STATE v. GLASGOW.

[CONFERENCE REP. 38.]

MEANING OF "GOOD AND LAWFUL MEN."—The words "good and lawful men," in the caption of an indictment, inquest, etc., mean freeholders.

JUDICIAL NOTICE.—The civil divisions of the state into counties, etc., must be taken notice of judicially by the court.

CRIMINAL LIABILITY OF PUBLIC OFFICER.—If a public officer intrusted with the exercise of definite powers for the benefit of the community, wickedly abuse, or fraudulently exceed them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example in perverting those powers to the purposes of fraud and wrong which were committed to him as instruments of benefit to the citizens, and of safety to their rights.

INDICTMENT against Glasgow, the secretary of state, for fraudulently issuing land warrant. The jury found him guilty; the counsel for the defendant moved for a new trial upon several

grounds, but relied chiefly on the ground of the verdict being contrary to evidence. The court declared they were satisfied with the verdict, and refused to grant a new trial. The attorney-general then prayed for judgment against the defendant, when Haywood, for the defendant, moved for the arrest of judgment, and filed the following reasons:

1. The caption does not state any legal authority in this court to take the said indictment; the commission is stated to be made to the judges to inquire by the oaths of good and lawful men of the counties of ———, and there is no law of this state which authorizes an inquiry otherwise than by the oaths of freeholders;

2. The caption does not state the indictment to have been found by the oaths of freeholders;

3. There is no such commission as that stated in the caption; the commission by virtue whereof this court sits is a commission to inquire of the offenses committed in the office of the secretary of state, or in the office of Martin Armstrong, or in the office of John Armstrong, in, etc.; but the commission described in the caption is to inquire of offenses in the two former offices only;

4. The commission by virtue whereof this court sits is to inquire by the oaths of freeholders, whereas the commission by virtue whereof the indictment is stated so to be taken, is to inquire by the oaths of good and lawful men only;

5. The several offenses in the indictment mentioned are supposed to have been committed on the several times therein mentioned, at the county of Greene, within the jurisdiction of this court, not stating the said place to be within any of "the districts of the" state, whereby the court might see that the said offenses were committed within the extent of their jurisdiction; and in fact at these several times there was no such county as the county of Greene within any district.

By Court, MACAY, J. As our opinion rests upon a few plain and obvious principles, it is unnecessary to enter into an elaborate examination of the cases cited in support of this motion. They are, generally speaking, good law (though to this, the case cited from 1 Dyer, 69, forms an exception), but we do not think they apply to the case under consideration.

With respect to all those reasons which proceed upon the ground that the expressions "good and lawful men" are inserted in the caption and commission, instead of the word "freeholders," the answer is that these words are to be under-

stood according to the subject-matter relative to which they are applied. In this instance, the words are used as forming an inquest; and an inquest formed of good and lawful men, must be of freeholders. *Liberos et legales homines*, are the terms which have always been used in the *venire facias*, and their legal import and signification is freeholders, without just exception: 3 Bl. Com. 351; 4 Bl. Com. 350. But even an objection to the caption of an indictment, founded in the omission of such words, ought not to prevail, especially if the indictment be in a superior court, and that which is omitted be in common understanding implied in what is expressed: 2 Hawk. cap. 25, sec. 126.

The exception arising from the supposed error in setting out the commission, is not founded in point of fact, and has, therefore, been abandoned in the argument.

It is certainly an undeniable rule that the place where an offense is stated to have been committed, must appear to be within the jurisdiction of the court which tried it, and the question for us to decide is, whether the county of Greene does not appear to be within the jurisdiction of this court?

This court is authorized by the commission to inquire into any offenses it describes, which were committed within any district of the state, the county of Greene is within a district of the state; and thence it necessarily follows that it is also within the jurisdiction of this court. The civil divisions of the territory of the state into districts, and their subdivision into counties, serve to define and limit the boundaries of jurisdiction allotted to the superior courts; in this respect they form an essential part of the public law of which the court can no more be ignorant than of the fact, that every county in the state is within some one of its districts. Thence, if an offense is laid to be committed in a county, corresponding in name with one in the state, we must, in reference to the extended jurisdiction of this court, understand it to be one and the same. Would it not be fanciful and extravagant to presume it to be out of the state?

And why make the presumption that it has been ceded to congress, when we know the fact is otherwise? Besides, the offense is laid to have been committed by the secretary of state being there (in the county of Greene) in the exercise of the said office. Here again, in order to give effect to this objection, we must make another unreasonable presumption that the secretary of state was exercising his office, and did issue from his office out of the state this military land warrant. But in truth, if it

had appeared on the trial that the offense was committed without the limits of the state, the defendant would have been discharged for want of jurisdiction. But if the place laid is within the jurisdiction of the court, a mistake in that point would not have been material, unless the place had formed a part of the description of the offense, and was not stayed merely as a venue: 4 Bl. Com. 306. In fine, the reasoning upon which all the cases are founded, which were cited to prove the necessity of naming the ville, is obviously inapplicable to the present topic, because the jury are summoned altogether from other counties than that where the offense is laid to have been committed. As to the objections made to the first count, it is to be remarked that the gist of the offense there stated, is the fraudulently issuing a duplicate warrant, knowing the original to have been previously issued. We do not think it necessary that a positive allegation should have been made that the original was issued, but it was necessary that proof to that effect should have been made on the trial, and it accordingly was made. In principle, the same objection was made in *Rex v. Lavby*, 2 Str. 904, and overruled. If a positive averment of the issuing the original warrant was unnecessary, it follows that the objection in growing out of its not being particularly described, must also be invalid.

It is further objected that no injury is stated to have ensued the act of this issuing the duplicate.

If the act was done in the manner charged in the indictment, and as the jury have found it, the defendant has certainly committed a misdemeanor, which is indictable at common law. No rule of law requires that a circumstance, which forms no ingredient in the crime, should be stated in an indictment; and if a public officer, intrusted with definite powers, to be exercised for the benefit of the community, wickedly abuses or fraudulently exceeds them, he is punishable by indictment, although no injurious effect results to an individual from his misconduct. The crime consists in the public example, in perverting those powers to the purposes of fraud and wrong, which were committed to him as instruments of benefit to the citizens and of safety to their rights. If to constitute an indictable misdemeanor, a positive injury to an individual must be stated and proved, all those cases must be blotted out of the penal code where attempts and conspiracies have been so prosecuted, yet they are numerous and authoritative: 3 Bac. 549, in *notis*, new edition. The offense charged in the second count, succinctly

stated, is this, that the defendant issued a grant to Mulherrin upon a duplicate warrant, which had been previously issued to the heirs of E. Roberts, the right to which Mulherrin claimed, under an assignment from Elijah Robertson. In order to fix this as a fraudulent act upon the defendant, it is deemed necessary by the drawer of the indictment to describe the agency that Mulherrin had in the business; accordingly the count begins with stating the steps taken by him in order to obtain the grant, pretending that Robertson had assigned the warrant to him, although he did not produce any legal evidence to prove either Robertson's title or his assignment; and the offense, as laid, consists in issuing the grant under all the circumstances of the application made by Robertson, and with a full knowledge of them.

These are, therefore, repeated in the second branch of the count, and introduced by the participle "knowing," which necessarily refers to the whole of them, and carries the sense throughout the whole paragraph which contains the recital of Mulherrin's acts or omissions. The sense of the whole count aids the construction and unless the former is separated from the latter part of it, it is understood upon reading thus: that the defendant well knowing that the duplicate was illegal, etc.; well knowing that Mulherrin had not produced to him any legal evidence to prove that E. Robertson was entitled, etc., or to prove that he had assigned it to Mulherrin, fraudulently issued the grant, etc.

The four following objections to the second count have been substantially answered in noticing the exceptions to the first. What concerns the essence of the crime and the gist of the charge is laid with certainty sufficient to enable the defendant to know the offense wherewith he is charged, and to enable the court to discern upon the record a crime punishable by law. In misdemeanor, where no particular technical phrases are appropriated to describe the act, nice and overstrained exceptions have not usually prevailed: 2 & 3 Burr. Rep. The last reason is founded upon the supposition that the lands stated to be included within the description of the grant were not the lands of North Carolina, but of the United States, and it is thence concluded that the fraud is exclusively cognizable in the courts of the United States. However the fact may be, as to the title of the lands, the defendant was a public officer of the state of North Carolina, and it was by virtue of that character alone that he was enabled to commit the offense charged in the in-

dictment. All his acts wore the semblance of official duties, and but for the inquiry now instituted, might still retain the stamp of public authenticity. By his signature the faith of the state was pledged for the purity and honesty of the documents to which it was annexed, and her character, honor and dignity required that it should never be pledged in vain. The security of the citizens' rights, no less than the reputation of the state, was intimately connected with a faithful discharge of the duties appertaining to an office of such high importance; a confidence commensurate therewith was reposed in him; and this, after patient examination, is found by the jury to have been abused in the particulars charged. To the jurisdiction of the state, therefore, we think he is strictly and properly amenable.

Reasons overruled.

SIMPSON v. NADEAU.

[CONFERENCE REP. 115.]

ADMIRALTY JURISDICTION.—The question of prize or no prize is exclusively of admiralty jurisdiction, even though the vessel captured was not carried into a port for condemnation.

TROVER to recover the value of a brig and cargo. Sometime about the beginning of the year 1796, the schooner *Bellona*, a privateer commissioned by the French Republic, cruising off the island of Jamacia, fell in with the brig *Sally*, loaded in part with sugar and coffee, and in part with American produce. The brig had no register on board and the privateer took her on the high seas, under the pretense of a prize, carried her into the port of St. Jago, in the Island of Cuba, and without any regular form of condemnation, sold the brig and cargo. Simpson instituted the action against Nadeau upon the principle that he was the owner of the brig and cargo; that he was an American citizen, and consequently that the brig and cargo were neutral property, not liable to capture. On the trial Simpson proved a property in the brig and cargo and obtained a verdict for one thousand two hundred and forty-five pounds and costs, subject to the opinion of the court, whether the court had jurisdiction of the cause.

Haywood, for the plaintiff.

Jocelyn, for the defendant.

MALL, J. In England there are two admiralty courts of civil jurisdiction; the one is called the instance court, the other the

prize court. In many instances the courts of common law have jurisdiction of trespasses committed on the high seas, as for seizing, stopping or taking a ship on the high sea not as prize. But whenever the trespass complained of is a taking, etc., on the high seas as prize, the courts of common law have not jurisdiction. The nature of the question, not the locality, constitutes the rule on which depends the jurisdiction of the courts of common law. But for the taking, etc., as prize, (of which the courts of common law have not jurisdiction) the prize courts have sole and exclusive jurisdiction: Doug. 592. A trespass for taking a ship, etc., not as prize, is the object of municipal law. The prize court is governed by rules and regulations peculiar to itself. In this court generally disputes arise not between citizen or subjects of the same, but of different nations. It is, therefore, proper that such disputes should be determined by the laws and usages of nations, and such regulations as may exist between the nations to which the parties belong; so that the same rules of decision are common to prize courts, whether established in one country or another. The powers of of the instance courts and prize courts constitute the extent of jurisdiction of the courts of admiralty in the United States: 3 Dallas, 16. It appears, from the record in this case, that the defendant captured the prize by virtue of a commission from the French Republic, and in consequence of the said brig being without a register, etc., the defendant sets up no claim to the brig, nor justifies the taking of her on any other ground. Is this, then, a question of prize or no prize or not? I think it is, and that this court consequently has not jurisdiction, but that the court of admiralty has sole and exclusive jurisdiction in cases of this description.

It has been urged for the plaintiff that this matter ought to have been pleaded to the jurisdiction of the court, and that the not pleading it in that form is a waiver of it; but consent cannot give original jurisdiction to a court which has it not: 2 Burrow, 746; 2 Wash. Rep. 215. It was decided in the case of *Row v. Hassard*, cited in Doug. 581, that the plaintiff could not recover in trespass for taking a ship as prize, the plea of not guilty being pleaded. It has also been urged for the plaintiff that unless the court will grant him relief he will be without a remedy, because only the person of the defendant is within the reach of the courts of admiralty and those courts will not proceed against the person in the first instance.

I think this is a case of prize or no prize, and that the courts

of admiralty have exclusive jurisdiction of it. I know of no authority warranting an exception from this general rule, in the case where the person of the captor only, and not the vessel captured, is within the jurisdiction of the courts of admiralty. It has likewise been urged for the plaintiff that as the defendant converted the brig to his own use before any adjudication took place respecting her by a proper tribunal, he ought to be considered a trespasser *ab initio*. In order to ascertain the merits of that argument, we must have recourse to the particular usages and regulations that may exist between the countries to which the plaintiff and defendant may belong. To go in search of these would lead us out of our course; they exclusively belong to the prize courts. If it is said that the brig Sally belonged to the citizen of a neutral nation, and therefore could not be the subject of prize, it may be observed that the owner of a neutral ship may violate his neutrality by carrying contraband goods, by taking part with one of the belligerent powers improperly, etc. Whether the being without a register etc., would justify a capture, etc., is not, I think, for this court, but a prize court, to determine. I am of opinion, therefore, that however strongly the justice of this case may plead for the plaintiff, that this court has not jurisdiction of the subject-matter for which this suit has been brought, and that judgment should be entered for the defendant.

JOHNSTON, J. In this case, in order to decide whether the plaintiff has a right to recover, it must be inquired into whether the vessel and cargo were prize or not; and it stands admitted in every case where the question of prize or no prize must be decided, that the courts of common law have no jurisdiction, but that it appertains exclusively to the courts of admiralty. There are cases where the courts of common law have taken cognizance of torts committed on the high sea by one British subject on the property of another, but do not find that in any instance they have sustained a suit by a subject against a foreigner acting under a commission from his sovereign.

MACAY, J. This case states that the brig and cargo were taken on the high seas under the pretense of a prize, by the privateer Bellona, commissioned by the Republic of France, the brig and cargo carried into the Spanish port of St. Jago, in the island of Cuba, and there sold without any regular condemnation; that defendant was owner of the privateer; that the brig had no register on board. The plaintiff, being an American

citizen, claims said brig and cargo as neutral property, as not liable to capture. A verdict has been obtained in this case in the superior court of law, for the district of Newbern, subject to the opinion of the court on this question, whether the court has jurisdiction of this case? To determine this question it will be necessary to inquire whether this brig and cargo were taken on the high seas as a prize, and if so taken, whether she was or was not a prize.

The case states that she was taken by a privateer commissioned by the Republic of France, "under the pretense of a prize;" that she had no register on board. The expression, according to my understanding, is the same as if the case had stated she was taken as a prize; the caption was the purpose of making a prize of her and cargo; then the other question arises, was she a prize or not? To determine this, the court of admiralty has the sole, undisturbed and exclusive jurisdiction, which they are bound to determine agreeably to the law of nations: 3 Black. 108; 69 Doug. 504; *Le Caux v. Eden*, 2 Dall. 160; 4 Term. Rep. 382; 1 Mol. 57; 3 T. R. 341, 343, 344. In opposition to these authorities I find but one: *Beake v. Ferrell*, Comb. 120, in which it appears that on the question, prize or not, the courts of common law and admiralty have a concurrent jurisdiction. In 1 Show. 6, this case is also reported and explained. She was seized by the East India Company, and there condemned by their admiralty. The question, prize or no prize, to be determined by the law of nations, made no part of this question. All the other authorities that I have been able to examine, do expressly state that the courts of admiralty have the sole and exclusive jurisdiction of determining prize or no prize. It is true that trespasses may be committed on the high seas by one ship taking goods from another tortiously, and by various other means of which the courts of common law have jurisdiction. Where the admiralty has not original jurisdiction of the cause, the jurisdiction of the courts of common law is not entirely taken away: 3 Blanc. 108; Comb. 462. But in no case have they interfered where the question, as in the present case, is prize or no prize. I am of the opinion that the superior court of law had not jurisdiction.

Judgment for defendant.

See *Jenkins v. Putnam*, 1 Am. Dec. 594, for a similar decision.

WILLIAMSON'S ADMINISTRATORS v. SMART.

[CONFERENCE REP. 146.]

LAW OF DOMICILE GOVERNS AS TO DISTRIBUTION OF PERSONAL ESTATE.

—The personal estate of an intestate wherever it may be, is to be distributed according to the laws of the country where the intestate was a resident, or in other words, where he was a citizen or subject at the time of his death; therefore, slaves in Virginia which belonged to the estate of an intestate who was a citizen and inhabitant of this state, must be distributed according to the laws of the state wherein he had his domicile, slaves being here regarded as personal property.

ACTION of trover to recover the value of several slaves; the facts of the case appear from the opinions.

HALL, J. In this case both of the plaintiffs and defendants claim the negroes for which this action is brought, under William Williamson, one of the legatees of Thomas Davis. The special verdict states that William Williamson removed himself to and became a citizen of this state, where he lived to the time of his death. It is admitted that at the time of his death, by the laws of Virginia, negro property was made to descend like land to the heirs at law, he making on that account some pecuniary satisfaction to the next of kin; and that at that time, by the laws of this state, property of that description was made distributable equally amongst all the children of an intestate. The question is, whether the negroes for which this suit is brought shall be disposed of agreeably to the laws of Virginia (they having been in Virginia at the time of the death of William Williamson, their owner), or by the laws of this state, where William Williamson was a resident at the time of his death. I take the rule of law in such case to be this: that the personal estate of the intestate is distributable according to the laws of the country where the intestate was a resident, or in other words, where he was a citizen or subject at the time of his death: *Ambler* 25, 415; 2 *Vesey*, 35. Although by the laws of Virginia, negroes are made to descend like land to the heir at law, in many other respects they are considered to be personal estate; and indeed our law would view them as personal estate, when any case like the present would occur notwithstanding the laws of Virginia would ever view them in all respects as real property. I cannot think the decree made by the court of Amelia strengthens the defendant's title because the plaintiffs were not parties to it—had they been parties to it, and the grounds on which the present pretensions rest been made known

to that court, I presume their decree would have been different. I think that all the children of William Williamson are equally entitled to the property in dispute among whom the plaintiff will be compellable to make distribution after debts are paid, etc., and that judgment should be entered for the plaintiff.

TAYLOR, J. The material facts of this case are, that Thomas Davis, by his will, which was admitted to probate in the year 1722, bequeathed a female slave, of the name of Sarah, to his daughter, Frances Williamson, during her life; and after her decease, the wench and her increase to be equally divided among the children of Frances. Frances had six children, one of whom, William, removed into this state, and died in 1768, leaving a widow and nine children; George being his eldest son. Afterward, in the beginning of the year 1769, Frances died; upon which the issue of Sarah were divided under the authority of a court of chancery in Virginia. A sixth part was allotted to George as the heir at law of William—this was received by his guardian, and afterward, upon his arriving at full age, brought into this state by himself; until which time all the negroes descended from Sarah have remained constantly in Virginia. George died in the year 1780, leaving a widow and child, who possessed themselves of the negroes, which they have retained ever since. The widow of William administered upon her husband's estate, and afterward intermarried with Peter Cox, who, together with his wife, hath brought the present suit to recover the negroes as of the goods and chattels of William; having previously demanded them of the defendants, one of whom defends as administrator in right of his wife, to George Williamson, and the other as guardian to George's child.

From these facts two questions arise: one is, whether the division made in Virginia ought not, as far as it respected the share claimed through William, to have been according to the laws of this state, whereof William, before and at the time of his death, was a citizen and inhabitant? The other is, whether upon the supposition that the division was improperly made, the decree directing it is not conclusive, as the sentence of a court of competent jurisdiction.

As to the first, I consider it perfectly clear and well settled, that although the descent of lands is to be regulated according to the law of the country wherein they are situated, yet the succession and distribution of movable property is to be guided by the law of the country where the owner has his

domicile. This is a principle of the law of nations, which hath been recognized and sanctioned by a variety of adjudications: 2 Vesey, 85; Ambler, 25; 4 T. R. 184, etc.; Bl. 131; 437, 691; Ld. Kames, 274; Vattel, b. 2, c. 7, s. 85; c. 8, s. 109, 110. I can entertain no doubt that these authorities must be approved and acted on, by the courts of this state, upon an application to distribute the effects of a foreigner, if made within due time; and that they would receive evidence of the law according to which the distribution was sought. I do not indeed recollect any decision upon this point in our own courts, but my opinion is founded no less upon the weight and number of the cases than upon the intrinsic justice of the principle which pervades them. It seems also to acquire strength in its application to the United States from the nature of their political relations, which are calculated equally to cherish a spirit of friendly intercourse amongst their respective citizens, and to promote in each state a respectful deference to the laws of all.

The court of Virginia would, without doubt, have given effect to the claims of the other parties concerned, unless there be some law of that state expressly to prevent it. The existence of such a law, however, cannot well be imagined, because there can be no reason wherefore that state should be concerned about the manner in which strangers hold that sort of property, which they may freely carry away with them. All that, as a state, they can be interested in ascertaining is, whether the party asserting a claim has really a right, according to the laws of his own country; and whether those laws vest a chattel in one person or direct its division among twenty, they equally merit respect and observance. Therefore, if in the state of Virginia this property is clothed with some of the qualities of real estate—if like that it is made descendible to the heirs at law, and exempted from the payment of debts where there are sufficient assets without it, so far as its nature is changed; but in all other respects it remains, and must be considered as chattel property; and the local policy which hath thus distinguished it, must necessarily confine the operation of the laws respecting it to the citizens and inhabitants of that state. This must be understood, however, in relation to the laws ascertaining the right, and not those prescribing the remedy. The latter must, from their nature, bind equally strangers and citizens.

Slaves being then chattel property, notwithstanding incidents annexed to it applicable only to the citizens of that state, there is

a conflict of laws in the two states relative to them; and in every such case the laws of the country where the owner resides must prevail. 2. The order made by the court of chancery in Virginia, relative to this division, cannot be conclusive as to the title of the negroes in question. Of the persons claiming a right under William, George alone was party to the suit in which it was pronounced. The other children, and the widow of William, were neither parties nor privies, nor was there any person before the court interested to protect their rights, or even to disclose them. Had the distribution been amongst all, George's share would have been so much the less; and therefore he was interested to keep their pretensions out of view. Besides the points now in contest were not decided upon the former occasion. The only question then was, whether the property should be divided into six equal shares, in which no doubt all the parties concurred; the question now is, whether the widow and children shall share with George the sixth part he received. The present plaintiffs, therefore, and those for whom they claim, have never been heard, their rights have never been asserted; and under such circumstances, it is contrary to natural justice, and to the law both of Virginia and this state, that they should be concluded by the decree. My opinion is consequently in favor of the plaintiffs.

JOHNSTON, J. Judge Taylor having fully explained the principles on which I found my decision, it is unnecessary to repeat them. I concur fully with him.

MACAY, J. It is sufficient for the determination of this cause, that in Virginia, negro slaves are considered as chattel property. Immovable property follows the disposition of that state wherein it is situated; but the succession and disposition of movable property is not regulated by the laws of the country where it is locally situated, but by that of the owner's *patria* or domicile: *Hunter v. Potts*, 4 T. R. 184.

Judgment for plaintiffs.

KENNON v. DICKINS.

[CONFERENCE REP. 257.]

RULE AS TO CALCULATION OF INTEREST.—In equity, as a general rule, interest upon interest is never allowed. However, when the sum is ascertained, and the annual payment of it forms part of the contract, where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly where the payment of the principal sum is postponed to a very distant period, upon the faith of the regular and punctual discharge of the interest, interest upon interest ought to be allowed.

BILL in equity, praying relief based on the following facts: The bill stated that the complainant, on the fifteenth of September, 1771, contracted with the defendant for the purchase of several tracts of land, and that the intention and understanding of the parties was that one thousand pounds Virginia money was to be the price of the land, to bear interest from the first of December, 1771; that there was to be a credit of fifteen years for payment of the principal, but the interest computed at six per cent. was to be paid annually; and if, at any time the complainant should pay a larger sum than the interest due, the excess should be applied to the extinguishment of the principal. The complainant gave his bond in the penalty of two thousand pounds Virginia money, with one Lewis as security, to which was annexed the following condition: "The condition of the above obligation is such, that if the above bound Charles Kennon and Howell Lewis do and shall well and truly pay unto the said Robert Dickins the just sum of sixty pounds current money of Virginia, annually, for the term of fifteen years, on or before the fifth day of December in every year, and after the expiration of the term of fifteen years, viz.: on or before the fifth day of October, 1786, the further sum of one thousand pounds, current money as aforesaid, then the above obligation to be void, etc. Memorandum, that if any part of the within principal shall be paid before the expiration of fifteen years, in that case, the part paid carries interest no longer than to the time the same was paid."

The bill then stated that on the tenth of December, 1771, the complainant paid the sum of one hundred and eighty-four pounds six shillings and six pence, which, after deducting the interest for the ten days due, left a balance of one hundred and eighty-one pounds eleven shillings and three pence, that ought to have been applied to the discharge of the principal, and that

afterward various other payments were made, and which, if properly applied, discharged the whole of the debt.

Notwithstanding an execution had issued for the sum of one hundred and fifty pounds, by reason of the defendant's charging interest on the sixty pounds payable annually, which, being itself the interest of the thousand pounds, ought not to be as interest. The complainant alleged that this is usurious, and directly against the intention of the parties, as well as the memorandum annexed to the bond. The answer of defendant alleged that he intended the price of the land to be nineteen hundred pounds Virginia money, payable in fifteen annual installments, at sixty pounds each, and the last payment to be one thousand pounds; and he understood, if default was made in the payment of any of the installments, that they should bear interest from the time they respectively became due. This was evidenced by the condition of the bond, the payments being arranged at different and distant days. The intention of annexing the memorandum to the bond was that if the complainant should pay any part of the money before it was due, that such payment should bear interest until the next day of payment. He admitted the payment on the tenth of December, 1771, but at the first installment of sixty pounds, as well as the ten days' interest, was then due. He likewise admitted the other payments charged in the bill, but claimed that their application, according to the true intent of the contract, left a balance due of one hundred and fourteen pounds and ten pence, for which he had taken out execution.

By Court, JOHNSON, MACAY and TAYLOR, JJ. According to the complainant's allegation, the parties understood the purchase-money to be one thousand pounds Virginia currency, to bear interest at six per cent., payable annually, with a credit of fifteen years for the payment of the principal sum. On the other hand, it is affirmed by the defendant that the price of the land, as intended and understood by him, was nineteen hundred pounds Virginia currency, payable by installments, according to the terms of the bond; the condition of which, as far as it has any weight in explaining the original transaction, gives countenance to this statement. If it be adopted as the ground on which the case is to be decided, no doubt can be entertained that the installments bear interest from the time they respectively became due; for being principal debts, and secured by specialty, such a consequence follows of course. But even if the complainant's statement were assumed as a true repre-

sentation of the contract, and these installments of sixty pounds considered the interest of the principal purchase-money, still the authorities cited go a great length toward showing that a court of equity might justly sanction the recovery of interest upon a failure in payment according to the agreement of the parties. As a general rule, interest upon interest is not allowable. But when the sum is ascertained, and the annual payment of it forms a part of the contract; where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention; and particularly where the payment of a principal sum is postponed to a very distant period, upon the faith of a regular and punctual discharge of the interest, it ought in justice to be allowed. To such a case, the principle upon which interest is generally allowed seems to apply with strict propriety, viz: to supply the place of prompt payment, and indemnify the creditor for his forbearance.

Injunction dissolved.

CASES
IN THE
CONSTITUTIONAL COURT OF APPEALS
OF
SOUTH CAROLINA.

STATE v. PITMAN.

[1 BREVARD, 32.]

POWER OF STATE TO PUNISH OFFENSES AGAINST UNITED STATES LAW.—

An indictment lies under a statute of the state for uttering and publishing counterfeited bills of the branch bank of the United States, notwithstanding the same offense is punishable by the laws of the federal government.

INDICTMENT for passing counterfeit bank-bills of the branch bank of the United States at Charleston. The defendant had been committed to prison, but was now brought before the court on a writ of *habeas corpus*, and his discharge moved for, upon the ground that the offense specified in the warrant of commitment was not sufficient to authorize his detention.

Brevard and Brown, for the prisoner, contended that the offense charged was one against the laws of the United States, over which the national tribunals had exclusive jurisdiction; that if the court should not be of this opinion, yet the offense was not punishable by the act of 1736, 7 P. L. 146, 147, of this state, which declares that "to pass fraudulently any forged or counterfeit writing obligatory, or promissory note for payment of money, etc., with an intention to defraud any person, shall render the person who shall commit such fact, guilty," etc.; that the word "person" could not be construed to apply to the president, directors and company of the bank whose bills have been counterfeited. In the English statute, 2 Geo. II, c. 25, the words "person or persons" are used, yet it was doubted whether this general expression would bring the uttering of counterfeit bills of the corporation of the bank of England

within the statute, and 31 Geo. II, c. 22, and 18 Geo. III, c. 18, were passed to remove all doubt: *Palmer's case*, Leach C. L. 866; *Elliott's case*, Id. 175.

James, for the state.

By Court, JOHNSON, J. The national government may pass such laws as may be proper and necessary to avoid the mischiefs arising from the counterfeiting, and passing as true, the forged bills of credit of the bank of the nation; but it cannot be maintained that the several state governments may not also pass such laws as they shall deem necessary to the welfare of their internal concerns, in relation to the same subject. The power and authority which may be used and exercised by each in this behalf, is by no means incompatible, but perfectly reconcilable and consistent. As to the other objection to the detention of the prisoner, predicated on a strict construction of our act of assembly against the offense of forgery, etc., I am of opinion it cannot prevail. I see no necessity for construing the words of the act, "with an intention to defraud," as having reference to the person or persons whose name in the counterfeit bill has been forged, but on the contrary, I think they ought to be construed with reference to the person or persons to whom the false bills have been passed, where the charge is, as in this case, for uttering, and not for forgery.

Objections overruled, and motion for prisoner's discharge refused.

In 1 Bishop Cr. L., sec. 178, referring to this and other cases, the author there states the law: "There are we have seen, wrongful acts of a nature to violate duties both to the United States and a particular state. And some of these acts are declared crimes by the positive laws of each. It is probably the doctrine of the courts, though not free from doubt in principle, that whenever congress has the constitutional power to render a thing punishable as a crime against the United States, she can make this legislation exclusive of state law. But, however this may be, if the national statute neither in terms nor by necessary implication excludes the state law, the latter is not superseded."

NELSON v. EMERSON.

[1 BREVARD, 48.]

GENERAL VERDICT WHERE THERE ARE GOOD AND BAD COUNTS.—Where a declaration contains several counts, a general verdict may be referred to such of them as will sustain the action; and if one or more of the counts be good, judgment will not be arrested although the declaration contains one which is bad.

MOTION in arrest of judgment. The declaration in an action of slander contained the three following counts: 1. For calling the plaintiff a hog-thief, and saying that he was forsworn; 2. For calling him a damned hog-thief; 3. For saying to him these words: "You are a damned forsworn rascal," with an innuendo that the plaintiff had been guilty of willful and corrupt perjury. Verdict was rendered for the plaintiff generally on all the counts, and one hundred and fifty dollars assessed as entire damages.

A motion in arrest of judgment was then made, on the grounds, that the words contained in the third count were not actionable in themselves; that no *colloquium* relative to a judicial proceeding had been laid, to show that the words would bear the meaning imputed to them by the innuendo; and that verdict had been given generally and entire damages assessed on the three counts, of which one was bad.

Blanding, in support of the motion.

Falconer, *contra*.

TREZEVANT, J. In this action it appears that the plaintiff has declared in one count upon words that are actionable, and in the other count upon words that are not actionable; and the jury have given a general verdict for the plaintiff upon both counts, or, at least, without specifying on which count the verdict was given. It also appears that no special damage was laid in, nor proved, to maintain the count that contained the words which are not actionable. Whatever may be the law, according to the English cases, in such a case as this, I consider myself bound by the decision made by a full bench in Charleston, in 1798, in the case of *Neal v. Lewis*, 2 Bay, 204 (1 Am. Dec. 640.) In that case the words charged in one count were not actionable, and the jury gave a general verdict for the plaintiff; the defendant's counsel moved in arrest of judgment, because it could not be known upon which count the verdict was given and if given upon that which charged the defendant with words that were not actionable, the judgment ought to be arrested, because no special damage was charged in the declaration to have arisen from those words, nor was there any proof at the trial, of any damage sustained in consequence of speaking those words; but the court overruled the motion. I am, therefore, of opinion in this case, that the motion in arrest of judgment should be overruled.

BAY, J. I agree with my brother TREZEVANT in his opinion.

JOHNSON, J. In this case I feel myself precluded from a gen-

eral view of the subject, by the decision in the case of *Neal v. Lewis*, in Charleston, in which it was expressly decided, that on a general verdict in slander the plaintiff shall have judgment, although one count was avowedly bad; and the case of *Onslow v. Horne*, 3 Wils. 177, declared not to be law.

GRIMKE, J. There are two or three counts in the declaration, some of which are actionable, and some not; the verdict of the jury is a general one, without discriminating on which count they found. The case of *Neal v. Lewis*, argued some time ago in Charleston, has settled this point. The court there refused to arrest the judgment on the grounds here stated. I, therefore, consider myself bound by that decision.

BREVARD, J., having been of counsel for the defendant, expressed no opinion.

Motion refused.

See *Hopkins v. Beedle*, ante, 191, where a different rule, and one which is more generally held, was laid down in New York.

MARSH v. MUIR.

[1 BREVARD, 134.]

OBLIGATION OF INSURED TO COMMUNICATE FACTS.—The insured is not bound to anticipate a capture and condemnation in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such as to create so general an impression of danger as must enhance the premium of insurance; but a knowledge of facts and circumstances of the latter description is not to be presumed against the insured; and although he may be aware that certain circumstances may become ground of condemnation, in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured.

ACTION upon a policy of insurance. The facts were as follows: The brig *Hannah* had sailed from Newbern, North Carolina, in January, 1797, for Curacoa and Jamaica, but meeting with damage at sea put into Aux Cayes, without going to Jamaica, after having sold her cargo at Curacoa. At Aux Cayes, one Hall, the plaintiff's agent, shipped certain wines on board, to be carried to Newbern on the homeward voyage, gave notice to the plaintiffs and through them effected the policy of insurance in question upon the cargo. After sailing from Aux Cayes

the vessel was captured by a French privateer and condemned by a French court of admiralty.

It appeared that on the fifth of February, 1797, the French authorities in the West Indies published a proclamation, subjecting to capture and condemnation all vessels belonging to neutral powers destined to the windward or leeward islands, in the possession of the British, or emigrant and all vessels cleared for the West Indies generally; and by a previous proclamation, of November, 1796, had prohibited all American vessels from entering any British port in the West Indies. The policy in question was dated in May, 1797. The grounds of condemnation alleged in the sentence against the Hannah were, that she was destined for a British port, and that she had articles on board suitable for exchange with the British, and that they were intended for the British. It did not appear that Hall who negotiated the policy, knew that the vessel was destined to a British port; nor did it appear that the underwriters were fully acquainted with the nature and extent of French ordinances respecting American vessels.

The defense set up was, concealment of material circumstances relating to the vessel insured; that Hall, being a resident of the West Indies, knew of the proclamations of 1796 and 1797, and is presumed to have known the destination of the vessel on her outward voyage, which he should have disclosed to the underwriters. Defendants also relied upon the following circumstances: that on the fifth February, 1798, plaintiffs had assigned the policy to Thayer & Sturgis, who assigned it to one Russell on the twenty-third February, 1798; and offered evidence that Russell had relinquished his claim to the policy, and urged that Thayer & Sturgis were the real plaintiffs in interest. They then produced a bill of exchange indorsed by Thayer & Sturgis, which had been protested for non-payment, and claimed that this bill should be received as a set-off against the plaintiffs' recovery.

To rebut this evidence, plaintiffs were allowed to offer testimony to show that at the time the action was commenced the policy was not the property of Thayer & Sturgis but of William and James Thayer.

The jury disallowed the discount and gave a verdict for the plaintiffs.

The defendants moved for a new trial on the ground that the verdict was against evidence, and that the evidence in rebuttal was inadmissible.

Ford, Cheves, and Desaussure, for the defendants. The plaintiffs' agent knew of the destination of the vessel; it was his duty to know and it is to be presumed that he did. Representations should be full and true, otherwise it will be deemed a fraudulent concealment and vitiate the policy: *Park*, 178, 184, 208. Doubtful circumstances ought to be disclosed: 3 *Burr.* 1909; *Park*, 179; *The Genoa case*, 1 Bl. R. 463; *Park*, 208. The plaintiffs are liable for the acts of the agent as well those of omission as of commission: 1 *Tr.* 16. The verdict admitted to prove that the Thayers alone were owners of the policy was not evidence, it not being between the same parties or privies: *Bull. N. P.* 203. Moreover the names of Thayer & Sturgis appear indorsed on the policy and they should not be permitted to invalidate their own assignment: 1 *Tr.* 300.

Dayton and Simons, for the plaintiffs. The evidence as to Hall's knowledge of the destination of the vessel has been submitted to the jury who have found against it. The doctrine of concealment proceeds on the knowledge of the party insured: *Park*, 230; *March v. Pigot*, 5 *Burr.* 2802; *Park*, 229. They contended that the evidence was given not to impeach the instrument but to show who was the owner; that Sturgis' testimony relative to the assignment was proper, as it operated against any interest he may have had.

BREVARD, J. Two questions have been made and argued, and are submitted for the decision of this court: 1. Whether the plaintiffs are entitled to recover; 2. Whether the discount set up ought not to have been allowed.

With respect to the first point, from the information I have been able to collect from the arguments, and the statements of the judges who presided at the trial, as to the evidence, and from the best judgment I have been able to form thereon, I am of opinion that the plaintiffs are entitled to recover. No proof seems to have been brought home to the jury to persuade them that Hall, the agent, was acquainted with any circumstances at the time when he procured the policy to be underwritten, which, in the then state of things, it was incumbent on him to disclose. It could not have been foreseen, nor could he reasonable presume, that the vessel in question would be captured, and condemned by the French, contrary to the law of nations, and contrary even to the regulation of the French themselves; for the condemnation does not appear to be warranted by either of the French proclamations cited in the argument. If this policy is

avoidable, it must be on the ground of concealment, for it does not appear that there was any positive misrepresentation. It has been contended that the state of things in the West Indies, where Hall was, was critical and doubtful, and such as must have inspired him with apprehensions respecting the risk of the vessel on her homeward passage, which doubts and apprehensions he ought to have communicated, for that these circumstances, if they had been disclosed, would have enhanced the premium; and these being suppressed and concealed from the insurers was such a deceit as vitiates and nullifies the policy. But, I think, the insured is not bound to discover this kind of circumstances which lie in speculation and apprehension only, unless the general impression should be such as to make the idea of greater risk induce a general inclination to raise the premium. But this was not the case here from anything that has appeared to us. Upon the whole, as the question of concealment turned altogether on matters of fact, and depended upon the weight of evidence, which the jury ought to consider and decide on, being a matter entirely within their province, I must presume they have done their duty impartially and justly, as I have no right to presume otherwise, and, therefore, I think their verdict ought to stand: 2 Str. 1, 142; 3 Wils. 47; Doug. 359; 2 Burr. 665; Cowp. 87; 2 Wils. 240. 1 Wils. 22.

With respect to the other point, I have had considerable doubts. If we are to look no further than the policy and the assignments, it will appear to be the property of Russell. Mr. Russell was allowed to disclaim his interest, and to nullify the assignment to himself; whereupon it appeared to revert to Thayer & Sturgis, who had assigned it to Russell, and to whom it had been previously assigned by the present plaintiffs. If we stop here, Thayer & Sturgis must appear to be the real plaintiffs in this action, and in that case the discount is admissible. Russell's testimony did not go to impair or discredit the instrument assigned to him, but to support and explain it. He swore against his own interest, and, therefore, was the best witness that could be brought. I think his evidence was properly admitted, and that it fully proved the fact it was produced to prove. But on the other side it has been insisted that the plaintiff had a right to show that when this action was instituted the real owners of this policy were not Thayer & Sturgis, but William and James Thayer; and, consequently, that the discount was not between the same parties. The evidence to establish this position was admitted, and on the same principle

that Russell's was. The whole evidence as to that seems somewhat complicated and doubtful, but as the jury had it all before them, and have decided on it, I cannot pretend to say they have not decided rightly. As to the propriety of admitting such proof, I am of opinion that it is warranted by former decisions in this state, turning on the same principle, and particularly by the decision in the case of *Russell v. Lithgow*, 1 Bay, 437.

TREZEVANT, J. I think Hall must have known the material circumstances in question previously to the prosecution of the policy. The presumption arising from the nature of the case and facts conceded is extremely strong to induce this belief; and there was no evidence, it seems, to contradict such a presumption. This presumption, therefore, I am of opinion, ought to have been deemed sufficient until it was rebutted by some other evidence. These circumstances, which I think he did know, he ought to have disclosed, and his not having done so, was such a concealment as vitiates the policy. He must have known of the French proclamations, and he ought to have made known to the underwriters that such proclamations had been made; for he might suspect they were not acquainted therewith, and it does not appear that they did know of them in time. It is not known when they were promulgated and known in this country. I therefore think there should be a new trial on this ground.

It is not necessary that I should deliver any opinion on the other point respecting the discount.

JOHNSON, J. Fair dealing is the great principle by which all policies of this kind must be supported. Hall must be considered in the light of an ordinary correspondent, and not in that of a special agent writing expressly with a view to insurance; and, therefore, his neglect in making a full representation, shall not be imputed to the plaintiffs as if he had been specially employed by them to negotiate the policy. But, admitting their liability in its greatest legal extent, it does not appear, satisfactorily, that there was such a concealment of material circumstances, which were in the knowledge of Hall, or the plaintiffs, at the time when the policy was effected, as ought to avoid the policy. On the part of Hall, I cannot think there was either a *suppressio veri*, or *suggestio falsi*. I do not feel myself authorized to presume anything of this sort against the finding of the jury.

This case as it respects the discount, is clearly within the

principle established in the case of *Russell v. Lithgow*, *supra*. That case was stronger than this, for Lithgow's discount was merely equitable, and set up against a legal claim.

BAY, J., agreed with JOHNSON and BREVARD, JJ. On the second point he was of opinion that the discount ought not to have been allowed. He said it would be attended with great mischief to allow third persons, strangers to a deed or contract, to vary the rights of the parties in a collateral question.

WAITES, J. The vessel did not touch at a British port. There was no violation of the French ordinances; no breach of neutrality; no infraction of the law of nations. The sentence of condemnation was arbitrary and unjust; and the plaintiffs were not in fault. No representation on their part was necessary, in order to put the insurers on their guard against oppressive and illegal captures and confiscation, or acts contrary to the laws and usages observed among civilized nations.

The evidence as to the discount was properly allowed. It would not have been equitable and just to have restrained the evidence to what appeared on the face of the policy, or to the assignment; and having allowed the defendants to show by evidence, *dehors* these writings; that the right to the money due on the policy was in Thayers & Sturgis, for the purpose of establishing the discount set up against this action, it was certainly equally proper to allow the plaintiffs to rebut this proof, and show by other evidence that this right was not in Thayers & Sturgis when this action was brought, but had been previously transferred to and vested in other persons, and that the discount could not be allowed, being between other parties.

GRIMKE, J., concurred in opinion with the majority of the court. He presided at the trial, and thought that the evidence which was proper for the jury to determine on, was fairly submitted to them: 3 Wils. 47. On the second question, he observed that Sturgis, who had signed the assignment to Russell, for himself and partners, after this assignment was annulled, and it appeared to belong to the house of which he was a partner, was, undoubtedly, a competent witness, to prove that he himself had not any right to the policy. This was no more than Russell has been allowed to do, and it was either right or wrong in both cases; and, therefore, taking it either way, the discount could not be allowed.

Motion for new trial discharged.

WILLIAMSON v. TUNNO.

[1 BREVARD, 151.]

BREACH OF BLOCKADE TO INVALIDATE POLICY.—A mere intention to enter a blockaded port, without any actual attempt after being warned off, is no breach of the blockade, and no cause for condemnation, either by international law or by the treaty between the United States and Great Britain; and it was held that where an American vessel and cargo were condemned by a British court of admiralty, for persisting in an intention to enter a blockaded port, that the condemnation was illegal, and the insurers were liable.

SENTENCE OF FOREIGN ADMIRALTY COURT.—A sentence of condemnation by a foreign court of admiralty, which appears on the face of the proceedings to have been founded on facts which do not warrant the judgment, is not conclusive of the legality of the condemnation, in a question between the insured and the underwriters.

ASSUMPSIT on a policy of insurance on the cargo of the brig John, from Charleston to Cadiz. The vessel was captured off the coast of Spain by a British squadron near Cadiz, and was subsequently libeled and condemned by the British vice-admiralty court at Gibraltar, for an alleged breach of blockade. The sentence of condemnation stated "that the said brig cleared out for Cadiz, a port actually blockaded by the British forces; and the master persisted in his intention of entering that port, after warning from the blockading force not to do so in direct breach and violation of the blockade so notified." There was a variance between the libel and the decree of condemnation; the former alleging an actual attempt to enter the port of Cadiz after notice of the blockade, and also the brig and cargo were enemy's property, whilst the decree only stated that the master persisted in his intention to enter, etc. It was clearly shown that the brig and cargo were both *bona fide* American property, and that the master had made no actual attempt to enter the port after notice of the blockade; that in fact it was not possible to do so, as both he and the vessel were detained from the moment when she was first boarded by the blockading squadron. It appeared, however, that the master of the brig, having been carried on board the admiral's ship, was asked by the commanding officer where he would go in case he was released, to which he replied that he would go to Cadiz. The jury, under the instruction of Grimke, J., who presided at the trial, found for the plaintiffs; and the defendants now moved for a new trial on the ground of misdirection, and that evidence had been improperly admitted to invalidate the decree of condemnation.

Desaussure and Fbrd, for the defendants, argued that by international law every power had a right to prohibit all commerce whatever with the enemy in such places as it could effectually blockade: Martens, 318; Vattel, 508. Besides, under the treaty between the United States and Great Britain, it is expressly provided that if a vessel of either power shall, after notice, attempt to enter a blockaded port, she and her cargo, shall be liable to confiscation. The sentence of foreign tribunals in conclusive evidence of all matters of which they have jurisdiction: Esp. Dig. 145; Park, 363; 1 Bl. Rep. 238. The sentence against the brig John and cargo expressly declares that the condemnation was for a violation of blockade, and that sentence was conclusive of the question.

The counsel for the plaintiff was stopped by the court.

By COURT. The underwriters are bound to know every cause which may occasion natural perils, and also to take notice of all political dangers: 1 Esp. Dig. 72; Park, 195. The insured gave notice of the loss of the brig to the underwriters as soon as they heard of the disaster and abandoned to them, and they have a right to recover for a total loss: Esp. Dig. 80, 83. The only question in this case, therefore, is whether the cause of capture and condemnation was lawful, and such as discharges the underwriters. It is urged that the decree is conclusive; that the brig John had violated the blockade of Cadiz, but this does not appear by the decree itself. The libel, it is true, charges an attempt to enter that port; but the sentence seems to proceed on the ground of an intention, on the part of the master, of violating the prohibition to enter the place, and that unless he had been restrained by the captors, he would have attempted to enter. The intention, however, can be no just ground of condemnation, unless it be manifested by some actual, overt attempt to carry the intention into effect, and this is, in fact, negatived by the decree itself. The grounds of condemnation, as they appear on the face of the decree, containing the sentence of the vice-admiralty court, is not warranted by the premises, but is altogether unjust and in violation of the law of nations. It cannot then be conclusive on the parties in this case: Esp. Dig. 145; Park, 363, 415; 8 T. R. 434. Looking to the evidence, the injustice and illegality of the decree are still more palpable. The very existence of an actual blockade is disputable, but it is perfectly clear that the master of the brig knew nothing of a blockade until he was boarded; and it is equally clear that he made no attempt to enter

the port after notice, although that was his destination. In fact it was physically impossible for him to make any such attempt, for he and his vessel were detained by his captors from the moment when they were first boarded, and no opportunity was ever afforded to make an attempt to enter the port of Cadiz or any other port. It is true that he expressed an intention, if he were set at liberty, to enter that port; but even if he were not trepanned into this declaration, by the idea being held out to him that he might go where he pleased, this declaration did not warrant the condemnation. Giving it the worst meaning, it amounts to nothing. It was not an attempt to enter the port, and it would have been time enough to capture when he had made the attempt. The eighteenth article of the treaty with Great Britain exposes to seizure and condemnation vessels which persist in the attempt to enter a blockaded port, after being warned off. Here there was no such attempt; and persisting in the intention to enter, without any attempt to execute the intention, is not one of the cases specified in the treaty.

Without looking to the evidence, however, on this point, the sentence of condemnation is, on the face of the proceeding, unwarrantable and unjust, and the insurers are liable.

Motion for a new trial discharged.

STATE v. CREIGHT.

[1 BREVARD, 189.]

AMENDING INDICTMENT.—An indictment may be amended by the grand jury with leave of the court at any time before their finding is recorded and they have left the court; and the caption of an indictment may be amended by the minutes of the court or by what appears on the bill itself even after conviction and after motion in arrest for the defect.

CAPTION, CORRECTION OF.—The statement in an indictment that the presentment of the jury is “upon their oaths” is a part of the caption; and if it has been omitted may be inserted even after conviction.

ARREST OF JUDGMENT.—Judgment can be arrested only for defects appearing on the record; and an objection which must be established by extrinsic proof, as that the amendment of a defect in an indictment was made after bill found, is not a good ground for a motion in arrest.

Motion in arrest of judgment upon conviction on an indictment for horse stealing. Two questions were raised: 1. Whether an indictment was good if it appears that it was not found upon oath until after it was returned into court when the jury sub-

joined "upon their oaths" in the margin, but with no mark of reference to show where the words were to be inserted; 2. If this defect was fatal, whether it was cured by the second count which stated "the jurors aforesaid upon their oaths aforesaid" find, etc.

TREZEVANT, J. The prisoner was convicted upon an indictment for horse stealing, in November, 1802, and his counsel moves to arrest the judgment upon the following grounds: 1. That when the grand jury returned this bill into court it did not appear upon the face of it that they had found the bill on oath; and that the words "upon their oaths present" were interlined by the foreman without the knowledge or consent of his brethren after he had delivered the bill; 2. That these words "upon their oaths present," were not interlined in the body of the indictment, but in the margin of it, and that too, without any mark of reference so as to show where these words ought to have been inserted; 3. That although the second count states that the bill was found by the jurors mentioned in the first count "upon their oaths aforesaid," yet those words can have no meaning because the word "oath" was omitted in the first count to which the second refers.

I am of opinion that the first objection is not a proper ground to be taken in arrest of judgment inasmuch as it does not appear upon the face of the record, but the truth of it is to be ascertained by other evidence. Nor do I think it can avail anything in any other shape, because the clerk reports to the court that the omission was noticed as soon as the bill was handed to him by the foreman, and it was returned to him immediately while all his brethren were in their bar; and he then made the amendment which he had a right to do.

The opinion which I feel bound to give on the second and third objection is not founded upon the English law, but upon the case of the *State v. James Johnston*, decided in Charleston while I was at the bar. A bill of indictment had been found against him in September term, 1796, and traversed; and he was tried and convicted upon it in January term, 1797. The offense was challenging Mr. C. C. Schutt. On behalf of the defendants a motion in arrest of judgment was made on several grounds; one of which was that the caption of the indictment did not mention either the day or the year when the court was held at which the bill was found; and the case was argued in February, 1797, by myself for the defendant, and by Mr. Pringle, attorney-general, for the state. BURKE, GRIMKE, WAITES, and BAY, JJ.

For the prisoner the following authorities were relied upon and others were cited: 2 Hawk. P. C. c. 25, sec. 127; Id. c. 10, sec. 9, Leach, 362. For the state the attorney-general contended that the caption was the work of the clerk and not his; and that the clerk might make it up at any time, and could amend it from the words "September sessions, 1796," endorsed by himself upon the indictment at the time the grand jury returned it to him. And he cited Crown Circ. Comp. 117, 118, 6th Ed., and 2 Hawk. P. C. c. 23, sec. 97 and 98.

For the prisoner it was argued, in vain, that even according to the authorities cited by the attorney-general, if the amendment could be made at all, it could not be made after the conviction, nor after the term in which the bill was found. The court unanimously overruled this objection.

BURKE and WAITES, JJ., said they did not conceive themselves bound to support all the subtle distinctions taken in the English books. "Especially," said BURKE, J., "where the defendant's life is not affected."

Ever since that decision I have considered the point settled in this country, that the caption of an indictment may be made up, or amended, at any time, from the minutes of the clerk made on the bill, or from what may appear upon the face of the bill. And I do not feel at liberty to inquire whether it is, or is not, consistent with the decisions of the English courts. Now, the exceptions taken in the second and third grounds of this motion, relate to the caption, for the caption ends with the words, "upon their oaths present:" 2 Hawk. P. C. c. 25, sec. 126. And as the caption may be amended at any time, if the amendment already made by the foreman is not sufficient, which I doubt, it may still be amended. I am, therefore, of opinion that the motion should be overruled.

BREVARD, J. I hold the same opinion as my brother Trezevant, and for the reasons he has assigned in regard to the first objection. With respect to the other objection, as I think the grand jury were authorized to amend the bill at any time, provided it was before the prisoner had pleaded, and before they were discharged; and the amendment may be considered to be their act, and made at that court when the bill was before them; and as I incline to think that the amendment ought to be considered sufficient to show that the bill was found upon oath, and to be the amendment of the grand jury; and, as I think, too,

that the words "upon their oaths aforesaid," in the second count, may be taken and construed with a reference to the amendment, making it still more certain that the bill was found by the jury upon their oaths; therefore I am of opinion that the motion should be overruled.

I rather incline to this opinion on account of the difficulty I feel in subscribing to the doctrine said to be established by the determination of the court in the case of the *State v. Johnston*, which I have never heard of till very lately, and have had no opportunity to consider. It does not appear to me that because the caption is no part of the indictment itself, being only the style or preamble, and because it may be amended on motion, so as to make it agree with the original record at any time during the term at which it is found, that, therefore, a material error in the caption is not a fatal objection in arrest of judgment: *King v. Fearnley*, 1 T. R. 816.

GRIMKE, J. After stating the case and remarking that Johnson, J., who presided at the trial, had corrected the statement of the prisoner's counsel by mentioning that the insertion of the words in the margin of the indictment was by the grand jury, before the bill was delivered into court, said, I am of the opinion that the motion should be overruled. I found my opinion on the determination in the case of the *State v. Matthews*, in Charleston, in January, 1802. It was resolved by the court in that case that the part of the indictment here in question was part of the caption, and might be filled up by the court at any time during the sitting of the court.

Motion refused.

See 1 Bishop Cr. Proceed., secs. 661, 662, where this case is cited. The author says: "There are, connected with the caption in what may be termed the American sense—in other words, the extended commencement used instead of the English caption—some questions which are a little difficult on the authorities, though perhaps plain enough when considered in the light of principle. In matter of legal principle, this extended commencement or caption is no part of the indictment as sworn to by the grand jury; it is a mere formal statement which, though placed at the head of the indictment, is still of no higher nature than is an entry on the docket made in court by the clerk—a thing which, if erroneous, is subject, like a docket entry, to be corrected by an order of the judge; or when it becomes transferred into the permanent records, to be amended to the same extent as any other part of those records. And it is believed, that though the decided cases may not be very distinct to this effect, and though some of them may even seem to come short, this doctrine is, on the whole, sustained by the adjudged law."

FANT v. McDANIEL.

[1 BREVARD, 172.]

EVIDENCE ACTION FOR MALICIOUS PROSECUTION.—In an action for malicious prosecution a copy of the indictment duly certified is admissible in evidence, and the original need not be produced.

PLEADING PROBABLE CAUSE.—Probable cause is not admissible in evidence under the general issue, in an action for malicious prosecution, but must be specially pleaded.

ACTION on the case for a malicious prosecution tried before RAMSEY, J., the jury found for the plaintiff, and the defendant applied for a new trial, on the grounds: 1. That a copy of the indictment had been improperly admitted in evidence in lieu of the original record; 2. That evidence of probable cause was improperly excluded because it was not specially pleaded.

By COURT. 1. In this action a copy of the indictment charged to be prosecuted maliciously, duly certified by the clerk of court, authorized to keep the same indictment, is admissible in evidence, and the original need not be produced.

2. That in order to entitle a defendant in this action to show that he had probable cause for prosecuting the plaintiff he must state such cause in his plea, and disclose the grounds on which he means to rely in his defense: Cro. Eliz. 134; 6 Mod. 216; 2 Esp. Dig. 533.

This case is instructive, taken in connection with *Young v. Gregorie*, ante, 556

ALKEN v. BOLAN.

[1 BREVARD, 239.]

IMPEACHMENT OF AWARD.—The court will not set aside an award except for misbehavior of the arbitrators, such as gross partiality, collusion or fraud, or for a mistake by which the award is made to operate in a way they did not intend; or for some mistake apparent on the face of the award. Evidence will not be admitted to show that the arbitrators have erred in judgment, either as to law or fact, where such judgment is free from the imputation of fraud or partiality.

MOTION for a new trial. The cause was tried in the district court, before TREZEVANT, J. It appeared that, pending the suit, the parties submitted matters in dispute to arbitration, by bond, conditioned that the award should be read in evidence at the trial. The defendant filed objections to the award: that the arbitrators acted under the impression of false principles of law; that

evidence was discovered after the award, not known before, which would materially affect the matter submitted; and that the award was not final. These objections were overruled at the trial, and were now made a second time in support of the motion for a new trial.

Hall, for the defendant, urged that the grounds which were good in equity to set aside an award were also sufficient to set it aside when offered in evidence in a case like the present: 3 Burr. 1258; 3 Atk. 494; 2 Fern. 725; 1 Dallas, 313; 2 Bl. Rep. 955.

Egan, for the plaintiff.

By COURT, all the judges present except GRAMER, J. Said, that awards are entitled to great favor and indulgence, and ought not to be too rigidly examined and construed. That it was a mode of deciding controversies which ought not to be discouraged; and, therefore, the courts had never set aside awards except for misbehavior of arbitrators, as on account of gross partiality, collusion or fraud; or else on account of some mistake, which arbitrators sometimes may fall into without design, by which their award is made to operate in a way they did not intend; or for some mistake apparent on the face of the award. An award will not be set aside upon suggestions, or proof, that the arbitrators have acted upon wrong impressions of the justice of the case, in matters of fact or of law; or, in other words, on account of the wrong judgment of the arbitrators, where such judgment is free from the imputation of fraud or partiality. The case cited from Dallas does not apply, having arisen upon a statute law of Pennsylvania.

A new trial refused.

A similar decision was made subsequently in *Shier v. Ross*, 1 Brev. 293, where it was determined that the court will not grant leave to examine the arbitrators to discover whether they have not made a mistake, and why a discount was rejected; and that awards cannot be impeached except for partiality, corruption, or other misbehavior of the arbitrators; or for some evident mistake appearing on the face of the award. This agrees with *Pleasants v. Ross*, 1 Am. Dec. 448, and *Blackledge v. Simpson*, ante, 614.

WALLACE v. DE PAU.

SAME v. TUNNO.

[1 BREVARD, 232.]

SEAWORTHINESS.—Where a vessel the day after sailing springs a leak, which increases to such a degree as to compel her to seek a port of safety without having encountered any gale, or sustained any damage from the dangers of the sea, she must have been presumed to have been unseaworthy at the time she sailed, and the insurers are discharged.

MOTION for a new trial. Both actions were of the same other nature, on policies of insurance; one upon the freight, the upon the cargo. The voyage was from Savannah in Georgia, to Savannah la Mar in Jamacia. Soon after sailing the schooner sprang a leak, in consequence of which she bore off to Nassau, New Providence, where she was libelled and condemned as unseaworthy. The protest of the captain, two seamen and mate, was introduced in evidence, which stated that the leak occurred the day after the vessel sailed, and increased to such a degree, that a consultation was held, as to what should be done, when it was determined to make for Nassau. At this time they encountered heavy gales of wind. They arrived at Nassau with two feet of water in the hold. There they sold the cargo for one thousand two hundred and ninety dollars; some articles were swept off the deck in the stormy weather. It was proved that a vessel staunch and sound, will sometimes spring a leak. It was also proved that the captain had absconded with the proceeds of the sale.

The defense set up was, that the policy was void as the vessel was not seaworthy, at the time it was made, and the plaintiffs had produced no evidence to prove the condition of the vessel before she sailed. The fact that she sprung a leak so soon after leaving port, and being obliged to bear away to a port of safety, without any stress of weather to compel her, and her condemnation in the admiralty court of that port, as unseaworthy, altogether furnished the strongest presumptive evidence that the vessel was not seaworthy at the time she sailed. The verdict was given for the plaintiffs.

In support of the argument for a new trial, it was claimed: the insured warrants the vessel to be tight and staunch; and the insurers are not bound to examine the vessel and see whether she is so. The law implies a warranty on the part of the insured, that the vessel is fit to perform the intended voyage: Park, 383; 200, 398. If the incompetency is unknown it

makes no difference: Doug. 632; 2 Marsh. 364, 369; 1 Burr. 399. Seaworthiness is a question of law: 2 Marsh. 369. Where a reasonable presumption has been raised to prove that a vessel was not seaworthy when she sailed, it lies on the other party to rebut such presumption: 2 Marsh. 368, 369. For the plaintiffs it was argued, that seaworthiness was a question for the jury. The risk was considerable, and the premium was low, and therefore it may be inferred that the insurers had regard to the state of the vessel. In such a case the law will not imply a warranty of seaworthiness, as where the chances are equal: 8 T. R. 192; Park. 229. Marshall carries the doctrine too far by saying the insured must prove seaworthiness: 2 Marsh. 368.

Desaussure & Ward, for defendants.

Turnbrel & Drayton, for plaintiffs.

By Court, BAY, JOHNSON, TREZEVANT, and BREVARD, JJ.; absent, GRIMKE and WAITES, JJ., granted a new trial, being of opinion that the evidence given to prove that the vessel was not seaworthy at the time of her departure from port, immediately after the contract, was of such a nature as should have induced the jury to have found against the plaintiffs, unless some evidence had been brought before them to remove the very strong presumptions such evidence was calculated to produce. And as no evidence to this effect was produced, the court considered that the verdict was contrary to evidence, and ought to be set aside; more especially as the plaintiffs might have examined witnesses in Nassau, who could have given evidence on the point, so as to satisfy the jury more completely respecting the state of the vessel, when she arrived there. The court said that the question of barratry should not be considered in the case, since if the vessel was unsound when she sailed the barratry of the captain could not relieve the plaintiffs, or restore validity to a contract which was void in the beginning.

New trial granted.

See *Warren v. United Ins. Co.*, 1 Am. Dec. 164, for a decision on a similar subject; and see the note to that case as to what is implied by seaworthiness. See also *Barnesall v. Church*, ante 180, and the note thereto, where the subject is discussed.

PURVIS v. TUNNO.

[1 BREVARD, 259.]

CHARTER CONTRACT, WHAT SUFFICIENT TO DISSOLVE.—When a vessel chartered for a voyage becomes disabled by an accident while loading the cargo, the freighter will not be bound by the charter contract, unless she is repaired and rendered fit for the voyage within a reasonable time, of which the jury are the proper judges.

MASTER AGENT OF OWNER.—The master is the agent of the owner, who is liable for his defaults, although the whole vessel is chartered; unless the charterer engage the master and seamen, so that the hull only belongs to the owners.

MOTION for a new trial. The action was on a charter party, and was tried before GRIMKE, J. The contract was for affreightment of plaintiff's brig, from Charleston to Cowes and a market. It appears that the defendants had chartered the whole brig, and were lading her at the wharf, and had put on board a considerable number of articles. In removing the vessel from the dock to the head of the wharf, under orders of the captain, she grounded and received considerable injury, starting her butt-ends and springing a leak; the vessel was then taken to another wharf, where she discharged the heavy articles, and in about eight days was repaired and ready to receive her cargo; it did not appear very satisfactorily that she was seaworthy before the accident. The defendants after this abandoned the charter party, and refused to reload the goods after the vessel was repaired. The owner of the vessel employed the master and crew, who were subject to his orders.

Verdict for defendants.

For the plaintiff it was contended that although the accident should be considered as the fault or neglect of the captain, yet this would not justify a rescission of the contract, being a repairable accident; they only to be answerable for demurrage and charge, as in other cases by maritime law. The fault of the captain must be imputable to the charterers, who must be considered as the owners, *pro hac vice*; the captain being liable to their directions while lading, and they might have ordered the vessel into nother berth.

Desaussure and Ford, for plaintiff.

Pringle and Ward, for defendants.

By Court, BAY, JOHNSON, TREZEVANT and BREVARD, JJ.; absent GRIMKE and WAITES, JJ. The material question in this case seems to be, whether or not the vessel was in readiness within

a reasonable time after the accident; and this was a question within the province of the jury depending on matters of fact, and the rules of law applicable to those facts. In mercantile transactions, dispatch is oftentimes of much importance; and the defendants might have sustained considerable prejudice in point of interest, if they had waited until this vessel was repaired, before they sent away their merchandise. They were not compelled by law to do so, unless the vessel was ready in a reasonable time; and what was, or was not, a reasonable time, was proper for the jury to determine. With regard to the question, whether the master of a vessel, while receiving the cargo from the freighters, is to be regarded as their servant, and subject to their control, or as owner for the time, or not, the court were of opinion that the master can in no such case be so considered, unless the freighter be also his employer. Unless he has the appointment of the master, the latter has the direction generally of the ship, not only in the port of reception but elsewhere. The freighters ought not, on many accounts, to have superintending authority over the master. They might endanger the vessel; they might give contrary directions, etc. But if the charterer hires the ship, master, and marines, and the hull only belongs to the owners, it is otherwise; for in such case barratry may be committed, although the owner of the hull colludes with the master.

New trial refused.

GRUDER v. BOWLES.

[1 BREVARD, 265.]

DECLARATION OF PARTIES TO FRAUDULENT CONVEYANCE.—Where a conveyance is impeached for fraud as to creditors, the declarations of the parties to it, at the time of its execution are inadmissible to show that it was not made with a fraudulent intent.

CROSS-EXAMINATION OF WITNESS.—In the cross-examination of a witness, a party has a right to stop him if his answer relates to matters which the party who calls the witness has no right to introduce in evidence; and the latter cannot insist on his fully answering.

EVIDENCE SHOWING CONVEYANCE FRAUDULENT.—Although a voluntary conveyance may be valid yet where there are other circumstances of a fraudulent intention, the deed being voluntary and gratuitous, and the donor being in debt it is evidence to show an intent to defraud creditors; and a deed of conveyance made with the design to defraud one creditor is void as to every other creditor.

MOTION for a new trial. The action was trover, tried before BAY, J. The plaintiff sued as the trustee of one M. H., a *feme*

covert. The negro in suit, was taken under an execution, and sold by the sheriff as the property of the husband of M. H., and after several transfers, came fairly into the possession of the defendant. The negro, it appeared, had belonged to the husband of M. H., but was conveyed by him to her use by a trust deed. This deed was contested on the ground of fraud, as voluntary and made to defeat creditors. It was proved that at the time the deed was made, the husband was considerably indebted to various persons, and that several of his negroes were under mortgage. At the trial one O'Driscoll, who drew the deed of trust, was permitted to give in evidence, declarations made to him by the husband of M. H., and by herself at the time indicative of an honest intention, for the purpose of showing that the deed was *bona fide*, and not fraudulent, this evidence was objected to and was the principal ground for a new trial.

Cheves and Drayton, in support of the motion: 1 Esp. Dig. 142; 1 Fonb. Eq. 282, 270; Cowp. 432. In this case all the principal badges of a fraudulent conveyance to the prejudice of creditors were to be found: *Twyne's case*, 3 Rep. 81; Stat. 13, Eliz. c. 5.

Pringle and Duncan, against the motion, contended that the evidence on the point objected to had been drawn from the witness on his cross-examination by the defendant; the witness having been produced by the plaintiff to prove the deed only, and having been examined by the defendant as to the motives of the parties in making the deed, they contended that the deed in this case was founded on a good consideration; on a moral duty, not on moral turpitude: 1 Fonb. Eq. 260; the circumstance of its being voluntary does not affect its validity where the consideration is meritorious. It was also contended that the creditor, under whose execution the negro was sold, had slept upon his rights, having suffered the negro to have passed through so many hands before he was taken in execution.

By Court, JOHNSON, TREZEVANT, and BREVARD, JJ., in the absence of GRIMKE and WATTS, JJ., granted a new trial, on the ground that the evidence of O'Driscoll, as to the declarations of the parties at the time of the making of the voluntary deed of settlement in question, and of the wife of the said M. H., relative to the motives and intentions of the maker of the deed was improperly admitted in evidence. Such evidence was not warranted by the rules and principles of law as applicable to the case; and it is impossible to tell what influence that evi-

dence might have had in producing the verdict. The question of fraud or no fraud might have been determined by it. It does not appear that this evidence was brought forth by the examination of the defendant's counsel as alleged. It appears that they objected to the evidence before it came out, but the court admitted it. The declaration of a party should not be allowed in evidence to explain his intentions in favor of himself in questions of this nature. Voluntary conveyances may be valid; but where there are other circumstances of a fraudulent intention, the deed being voluntary and gratuitous and the donor being in debt are evidence, along with the other circumstances, of an intent to defraud creditors; and a deed of conveyance made with a design to defraud one creditor is void as to every other creditor.

BAY, J., contra, was of opinion that the verdict was according to the obvious justice of the case and therefore ought to stand. That the creditor, at whose suit the negroes were sold, had a mortgage of two other negroes, which was ample security for his debt, which he might obtain satisfaction for without resorting to the negroes in question. It was true that he acknowledged that the negroes mortgaged had been removed out of the state, by the instigation as was supposed of the mortgager; but still they might be come at; and, besides, the debtor was not insolvent but had other property. That the evidence to prove the deed fraudulent was slight and insufficient; and that although the negroes in question had been sold fairly at sheriff's sale, and had since passed through the hands of sundry persons, yet these vendees were not ignorant of the deed of conveyance, and bought with their eyes open.

New trial awarded.

VANDERHOST v. MACTAGGART.

[1 BREVARD, 269.]

WARRANTY, WHEN NOT IMPLIED.—A vendor of rice sold here is not liable under an implied warranty for a defect in its quality or soundness which is not discovered until its arrival abroad, and which, if it existed at the time of sale, might easily have been detected by an examination.

MOTION for a new trial. The action was *assumpsit* for rice sold and delivered, and the defendant claimed a set-off for unsoundness. It appeared the defendant bought fifteen barrels of rice from the plaintiff, and at the time examined two of them,

and had an opportunity to examine the remainder. A witness for the plaintiff proved that he brought the rice to Charleston to the plaintiff, and suspecting that some of the barrels had got wet in loading the vessel. He examined two of them, and found they had sustained no damage; that they came safe to that place under a close deck. A witness for the defendant proved that at Alexandria, in Virginia, where defendant sent the rice, after eight days' passage, he saw samples of it, taken from two of the barrels, which were bad, dingy, and musty, and in his opinion the cause of damage existed previously to the sale; and it sold considerably lower than if it had been sound and good. Other witnesses who saw two of the barrels at the time of sale, testified to its soundness.

Verdict for the defendant.

Desaussure, in support of the motion, argued that in purchases of this sort, no warranty is implied where the purchaser has an opportunity of examining and judging for himself. It would be very inconvenient, as well as dangerous, to the agricultural interests of this country, to allow the quality of its productions to be determined in foreign markets, for in this way many contracts might be rescinded. If the maxim *caveat emptor* be adhered to, no mischief will result, as it is easy for every purchaser of such an article as rice to examine and judge for himself.

Pringle, against the motion, insisted that the interest of planters and all others required that mutual good faith should be the basis of all contracts, and that where anything sold appears afterward to have been materially defective at the time of the sale, or sustains damage in consequence of some cause or imperfection inherent in the thing at the time of the contract, the party thereby prejudiced should be restored the money or consideration, or have some equivalent recompense.

By Court, BAY, JOHNSON, TREZEVANT and BREVARD, JJ.; absent GRIMKE and WATTS, JJ. A new trial, we think, ought to be granted in this case, on the ground that the verdict is contrary to evidence. We agree in principle with plaintiff's counsel, that the purchaser in such cases as this, is bound to examine thoroughly and judge for himself, and that it would be attended with great inconvenience, and might prove greatly prejudicial to planters, to allow evidence to show that articles of country produce sold and delivered here, such as rice, which is capable of an easy examination, and which might be fully examined,

and its quality and condition conclusively settled here, has been found in some foreign and distant market, to be of a different quality, or imperfect and defective, and not such as it was represented to be when sold here. It might open a wide door to fraud and imposition. In such contracts as this, we are of opinion there is no implied warranty where the buyer depends upon his own judgment, and buys upon an actual examination. *Secus*, where rice is bought by sample, and the buyer does not undertake to examine and judge for himself, but relies on the sample, although he may examine if he will. In such cases there is an express warranty.

New trial granted.

This case, as well as *Whitefield v. McLeod*, 1 Am. Dec. 650, is a modification of the rule established in South Carolina, in the case of *Timrod v. Shoolbred*, 1 Am. Dec. 620, that a sound price implies a warranty.

STATE v. LYMBURN.

[1 BREVARD, 397.]

INDICTMENT FOR INCITING TO AN ASSAULT.—One who incites others to the commission of an assault and battery, may be indicted and punished as a principal, if the offense be actually committed, although he did not otherwise participate in it. Whatsoever will make a man an accessory before the fact in felony, will make him a principal in treason, petit larceny and misdemeanor.

MOTION for a new trial. The indictment was for an assault and battery against the defendant and two others. It appeared that the defendant was the master of a vessel lying in Charleston harbor, not far from another vessel, on board of which the prosecutor was, an altercation arose between the prosecutor and the defendant, and between the men in the respective vessels, in consequence of which some of the defendant's men boarded the vessel of the prosecutor, in order to chastise him. The prosecutor made resistance and defended himself, whereupon the defendant, who was on board his own vessel, called out to his men, to "beat the rascal and throw him overboard." The assailants beat him very much, and almost fatally injured him. The jury found the defendant guilty. It was contended at the trial on the defendant's behalf, that he had done no act of violence, making him liable to an indictment, and that words alone will not make an assault, the same ground was taken on

the present motion, and it was urged that the judge who presided at the trial, had misdirected the jury, saying that "in the highest offense, viz: treason; and in the lowest offenses, viz: petit larceny and misdemeanor, that can be no accessories, but all are principals; and, therefore, as the defendant cannot be punished as an accessory, for standing near, and commanding, encouraging and abetting the trespass committed on the prosecutor, it must follow, as a necessary conclusion, on principles of law and reason, that he must be punishable as a principal; and although the maxim of law is that words alone will not constitute a battery, yet it does not follow that words, accompanied with actions which are induced by such words, or promoted by them, will not." The defendant's counsel relied on 1 Hawk. P. C. 133. The attorney-general cited 6 Bac. Ab. 580, and argued that the defendant was aiding and abetting, and thus made himself liable, as a principal wrong-doer. Thus in murder all present aiding and abetting, are principals: Plowd. 98.

By Court, WATTS, TREZEVANT and BREVARD, JJ. An assault cannot be committed by words alone. But in this case an atrocious battery was committed, and it is not the question whether an assault was committed, but whether the defendant, as *particeps criminis*, has been legally convicted as a principal, and we think he has. The law was not improperly laid down in the district court, on general principles, and is supported by authorities expressly in point. "It seems to have been always agreed," says Hawkins, see P. C. book 2, c. 29, sec. 2, "that whatsoever will make a man an accessory before in felony, will make him a principal in high treason and trespass, as battery, (cites Keilw. 55) riot, rout, forcible entry, and even in forgery and petit larceny. And, therefore, whenever a man commands another to commit a trespass, who afterwards commits it in pursuance of such command, he seems, by necessary consequence, to be as guilty of it as if he had done it himself." The act, causing the injury to the plaintiff, need not proceed from the immediate assault to make a party liable; but any wanton act, by which another suffers an assault or battery, will make a man liable to an action or indictment. 1 Esp. Dig. 818; 3 Wils. 403; 2 Bl. R. 892.

Motion overruled.

FLEMING v. McCLURE.

[1 BREVARD, 428.]

CUSTOM OF MERCHANTS RECOGNIZED.—The custom of merchants recognized by law in this state, in relation to protests and notices of non-payment of bills of exchange is the same as that in England, and of which judicial notice will be taken.

PROTEST, WHEN ESSENTIAL.—A protest, whether for non-acceptance or for non-payment, is essential in the case of a foreign bill of exchange, in order to charge the drawer or indorser; and where a bill was dishonored on presentment for acceptance, it is not sufficient to protest it for non-payment at maturity.

NOTICE OF DISHONOR, WHEN SENT.—Where a bill drawn in this country on Europe has been dishonored, notice must be sent by the first vessel bound to any part of the United States, and it is not sufficient to send it by the first ship for the port where the drawer and indorser reside.

DUE DILIGENCE NOT USED.—Where more than four months elapsed after a bill was dishonored in London, before notice was given to the drawer and indorser in Charleston, it was held that the jury could presume, unless the contrary appeared, that the holder had not used due diligence in giving notice required by the circumstances of the case.

PROMISE TO PAY, WHEN NOT BINDING.—A promise by a party bound to pay a dishonored bill is no waiver of a want of notice, when it is made in ignorance of the legal effect of the holder's laches.

NOTICE, WHEN UNNECESSARY.—The bankruptcy of the drawer of a bill of exchange renders it unnecessary to give notice to the indorser of its non-acceptance.

MOTION for a new trial. The action was on a bill of exchange; the case was as follows: Black, agent of the plaintiff, a merchant in London, purchased for him a bill of exchange drawn by one Douglass, in favor of the defendants, which was indorsed by them. The bill was dated October 1, 1801, and made payable sixty days after sight. It was presented on the fourteenth of November, 1801, to the drawee in London, who refused acceptance, and afterwards, when due, refused payment. The bill was protested for non-acceptance and non-payment. A letter from Fleming to Black was produced in evidence, dated January 1, 1802, and received in March following, wherein he informs Black of his having inclosed the protest for non-payment, and that as no opportunity had been offered of sending the protest for non-acceptance, he considered it would not be necessary to send it at all. Before the receipt of this letter, Douglass, the drawer, was declared a bankrupt. In Charleston where he resided, a notice for the protest of non-payment was served on the assignee of Douglass, the next day after receipt of the letter by Black, and also on the defendant, of whom payment was de-

manded. The defendants answered to the demand of payment, that they would make arrangements to pay the bill, and offered cotton in payment. It did not clearly appear that any opportunity of sending a letter direct from London to Charleston had occurred before the time of sending the letter from Fleming to Black. The defense was that the defendants ought to have had regular and seasonable notice of the protest of non-acceptance. On their behalf evidence was introduced that about the middle of November, 1801, one Lee had received a bill of exchange from England drawn by the said Douglass in favor of the said drawee, which was sent back protested for non-acceptance, and thereupon property of Douglass was attached. The plaintiff insisted on the trial: 1. That by the custom of merchants in the United States, a protest for non-acceptance of a bill of exchange has never been regarded as an essential requisite in order to charge the indorser; but only a protest for non-payment; 2. That under the particular circumstances of this case, protest and notice of non-acceptance were not necessary, whatever might be the general rule on that subject; 3. That at all events the defendants were bound to pay the bill on the ground of their express promise.

The jury found for the defendants.

Drayton, for the plaintiff.

Cheves, *contra*.

By Court, GRIMKE, WAITES, TRELEVANT, and BREVARD, JJ. The law merchant, as it obtains in England, is generally speaking, the law of this country. Some exceptions have been made, and some more may be made, which convenience and necessity have directed, and may hereafter suggest. The custom among merchants with us, in regard to bills of exchange, is the same which exists in England, as to protest and notices of non-acceptance and non-payment, and must be governed by the same rules. The judge, at the trial, was therefore right in rejecting evidence to prove a different usage from that which obtains in England. In the case of foreign bills, a protest is universally necessary, whether for non-acceptance or non-payment. It is an essential part of the custom of merchants, and is requisite not merely on account of the damages and interest, but also on account of the principal sum. In respect to inland bills, a protest is only necessary on account of damages and interest, and is founded upon the statutes 9 and 10 W. 3, c. 17, and 4 Anne, c. 9; Evans on Bills, 91. The cases cited,

adjudged in the courts of the United States, do not show a different custom, nor do they in any respect contradict this doctrine, but confirm it. They only go to show what evidence will be received; and that the protest, or a copy of it, is not necessary to be produced. Notice of such protest must be given to the party meant to be resorted to; but such notice need not be accompanied with the protest or a copy thereof: *Evans on Bills*, 56. This notice ought to be given as soon as the circumstances of the case will admit. Where there is a communication by post, it should be sent by the first post, but putting a letter into the post-office seems to be sufficient, although it may miscarry: 2 H. Bl. 509; *Chitty*, 95.

Respecting bills sent to Europe, notice should be sent by the first ship bound for the United States, according to the rule of the English courts respecting bills sent to India: 2 H. Bl. 509. The judge did right, therefore, in charging the jury to lay it down, that notice should be sent by the first opportunity that occurred, which the plaintiff might have known of, to the United States, whether it was direct to Charleston, or to some other port of the United States. And he did right, under the circumstances of the case, to leave it to the jury to presume, that an opportunity of sending notice sooner, than that by which the notice of non-payment was sent, did occur, by which the plaintiff might have sent notice to the indorsers, the defendants, of the non-acceptance, and which he neglected to embrace. The bill was presented for acceptance in the middle of November, 1801; and the defendants had no notice thereof, until some time in the latter end of March following, more than four months after. The probability is, that by the use of due diligence, notice might have been transmitted sooner by some vessel, or vessels, from England to the United States. This natural and reasonable presumption has not been rebutted by any evidence to the contrary. The laches of the plaintiff, in neglecting to exercise reasonable diligence, to give timely notice to the indorser, of the non-acceptance of the drawee, might be considered as an extinguishment of the debt, as to the defendants; and as discharging them from all responsibility on the footing of their indorsement: 1 T. R. 405; *Id.* 167; 5 Burr. 2670; 1 T. R. 107; *Chitty*, 98; *Bayley*, 83; *Evans*, 57; 6 East. 8, 14, 110.

But it has been insisted, on behalf of the plaintiff, that it was not necessary for him to give the defendants notice of the non-acceptance of the bill in this case, because the drawer had be-

come a bankrupt before any notice of the non-acceptance could have been transmitted to the defendants; and they could not have derived any advantage from the earliest notice that could have been sent to them, nor suffer any prejudice from the want of such notice. It seems to be agreed, that the bankruptcy, or known insolvency, of the drawee, is no excuse for the want of notice: Evans, 59. But notice may be dispensed with, if the drawer have no effects in the hands of the drawee; for in such case, the drawer had no right to draw, and cannot be injured by want of notice: 1 T. R. 405, 410. To say that effects may come in after, before the bill is due, is not sufficient. But will this doctrine apply in the case of an indorser, where the drawer is insolvent? 1 T. R. 712. When the indorser himself has become bankrupt, notice to his assignees, or to himself, cannot be necessary, for they cannot take up the bill; and the doctrine does not hold, as between bankrupt estates: 3 Bro. C. C. 1. In an action against the drawer, who became a bankrupt, it was held, that notice to the drawer was not necessary, because it appeared that he had no effects in the hands of the drawee; although the indorser had effects in the drawee's hands, and the bill was drawn for accommodation to the indorser. Notice to the drawer would have been of no use: 1 Bos. & Pul. 652. Where the payee sued the drawer for non-acceptance, and it appeared that the drawee had no effects in his hands of the drawer, the court thought notice was unnecessary: 2 T. R. 713; 1 Id. 405.

It is laid down by Evans, Essay on Bills, 62: "That according to the French ordinance, notice of non-acceptance was not necessary to the indorsers, if neither themselves nor the drawer had effects in the hands of the drawee; but the English courts have adopted a contrary rule, more correct; that the indorsers are not bound to make themselves acquainted with the transactions between the drawer and the drawee, and are warranted in acting upon the supposition that the bill was drawn by a person having sufficient authority for the purpose." Where the drawer or indorser is a bankrupt at the time of the acceptance or payment refused, it is unnecessary, as Chitty states, to give notice to him, or his assignee. In remarking on this passage, and the case of *Ex parte Smith*, 3 Bro. C. C. 1, Mr. Evans, page 63, says: "There does appear to be any sufficient reason for dispensing with notice to the drawer, who is a bankrupt, or to his assignees, if the drawer is solvent; and still less for dispensing with such notice to the bankrupt indorser, or his as-

signees, where the drawer remains solvent, because in these cases, their right to recover against the solvent parties may be prejudiced by the want of notice. Where all the parties are bankrupts, no such prejudice can arise." There is no case like the present where the action is against the indorsers, who are solvent, and the objection is the want of notice to them of the non-acceptance of the drawee, where the drawer has become a bankrupt. The insolvency or bankruptcy of the drawer being admitted, we cannot see what advantage the indorser could derive from notice of non-acceptance of the drawee. In this case, resort has not been had to the drawer, and, therefore, whether as to him or his assignees, notice was necessary, need not be decided. As to the indorsers, the question is, was it necessary to give them timely notice of the non-acceptance of the drawee? The reason which runs through all the cases on this subject, must be adverted to and considered, namely: the prejudice which the party resorted to is liable to sustain in consequence of the want of notice. If the indorsers had been apprised as early as possible of the non-acceptance of the bill, how could they have benefited themselves by that notice? Their recourse must have been to the drawer who had become a bankrupt, and consequently was insolvent. Nothing could have been obtained from him, but what might be obtained from his assignees without notice. We are, therefore, of opinion that it was not necessary in this case for the plaintiff, the immediate indorsee, to have given notice to the indorsers, the immediate and only indorsers, of the non-acceptance of the bill: 1 Esp. Rep. 302.

Another argument for plaintiff is that at all events, the objection of want of notice was waived by a subsequent promise to pay. In answer to this, the defendants say such promise or offer to pay cannot be obligatory on them, seeing that it was made under mistake, and through their ignorance of the law relative to the subject-matter of their promise. Cases have been referred to, wherein indorsers, having made such promises, without notice of the facts or circumstances of the case to which their promises related, were exonerated: 5 Burr. 2, 670; 1 T. R. 712. And it has been urged that no solid distinction exists between mistakes in matters of fact and mistakes or ignorance in matters of law. In the case of *Archer v. The Bank of England*, Doug. 638, this question arose, but was not decided. In *Bize v. Dickason*, 1 T. R. 285, it was touched on, but no express reference was made to a mistake in point of law merely. In a late case, see *Chitty on Bills*, 102, and *Evans on money had*

and received, etc., 24, it was laid down that if a party does not know the legal consequences of all the facts within his knowledge, and pays money in consequence of such ignorance, and under an idea that he might be compelled to pay it, he shall be entitled to recover it back. We are of opinion that under the circumstances attending this case, the promise or offer of the defendants to pay the bill did not amount to a waiver of the want of notice; for, although they might have been cognizant of all the material facts, yet it appears they were ignorant of the legal consequence of their not having had notice, and made the promise or offer under a mistaken idea of legal obligation: See Peake, 202.

Upon the whole, we are of opinion that a new trial ought to be granted on the ground that notice was not necessary to be given to the defendants of the non-acceptance of the bill, as they cannot, by want of such notice, suffer any prejudice; nor if seasonable notice had been given thereof could they have obtained any advantage.

New trial granted.

DE PEAU v. RUSSELL.

[1 BREVARD, 441.]

ABANDONMENT, RIGHT OF.—"Where a policy provided that no abandonment of the neutral property hereby insured shall take place in case of capture or detention by the British, until it be condemned, and the proceedings of the court and sentence of condemnation produced to substantiate the loss; and in case of capture or detention by any other power, the like document shall be produced until satisfactory reasons can be given that they cannot be obtained:" it was held that the right to abandon, for a capture, was restrained until after condemnation, whether the capture were by another power or by the British.

SAME.—Although there is no restriction in the policy, the insured cannot abandon for a capture, if, before giving notice of abandonment, he received intelligence that the vessel has been released, and has proceeded on her voyage.

SAME.—The insured cannot abandon, on the ground that the voyage has been defeated by a capture, after intelligence that the vessel has been released, and has arrived in safety at her destined port; and when it does not appear that the extent of the loss on the voyage is such as to justify an abandonment, as in case of a total loss.

PERILS INSURED AGAINST.—An extraordinary duty laid on the goods in the destined port, between the capture of the vessel and her release and arrival there, is not covered by the clause insuring against "all unavoidable perils, losses and misfortunes to the damage of the goods."

INTEREST ON AMOUNT OF AVERAGE.—Interest is not recoverable on the amount of an average, which was admitted by the underwriters, where the insured insisted on a right to abandon and recover for a total loss.

CASE on the following special verdict: "We find that the defendants insured on goods on board the ship *Pomona* the sum of eight hundred dollars, as appears by the policy attached and forming a part of this verdict. That the said ship was captured whilst proceeding on the voyage insured, on the nineteenth September, 1801, and carried into the port of Algesiras, and there detained until the twenty-second October following; and that a general average accrued at Algesiras, on the cargo insured, to be divided among the underwriters on the policy, to the amount of one thousand one hundred and fifty-two dollars; and that the ship was released on the twenty-third October, 1801, and proceeded to and arrived in safety at Malaga. But that previous to her release or departure for Malaga, as aforesaid, on the fifth of October, hostilities between the belligerent powers had subsided, and in consequence, a peace duty was laid on the cargo of the *Pomona*, which duty, during the war, was not demandable, but was imposed upon the peace taking place. That the plaintiffs, upon the first information of the capture and detention aforesaid, offered to abandon to the underwriters, which offer was refused. We, therefore, if the court should be of opinion that the plaintiffs had a right to abandon, or that the extraordinary duties were a loss within the terms of the policy, find for the plaintiffs an average loss of fifty-two dollars sixty-seven one-hundredths per cent., with costs. Or if the jury should be of opinion that the plaintiffs had no right to abandon, or that the extraordinary duties, on the intervention of peace, were not chargeable against the underwriters, we find for the plaintiffs an average loss, say a ratable proportion of the said sum of one thousand one hundred and fifty-two dollars as the said sum bears to the whole sum insured, with costs. And we also submit to the court the question of interest, under the circumstances of the case."

The policy here referred to, in its material points, is expressed as follows: "To be insured, lost or not lost, at and from Charleston to Malaga, upon any kind of lawful goods and merchandise, laden, or to be laden, on board the good registered American ship, called the *Pomona*, etc. Beginning the adventure upon the said lawful goods and merchandise, from, and immediately following the loading thereof on board of the said vessel, at Charleston, and so shall continue, until said goods shall be safely landed at Malaga, etc. The perils the assured are to bear, are of the seas, fires, enemies, pirates, assailing thieves, jettisons, letters of marque, takings at sea, restraints

and detainments, etc.; and all other unavoidable perils, losses and misfortunes, to the damage of the said goods, etc. Premium at the rate of eight per cent. acknowledged; and in case of loss, the assured to abate two per cent., and the insurer to indemnify at the prime cost of the goods, or their value in the policy, etc. The property to be warranted by the assured, free of any charge which may arise in consequence of a seizure or detention, on account of any illicit or prohibited trade, etc. It is further agreed, that no abandonment of the neutral property, hereby insured, shall take place, in case of capture or detention by the British, until it be condemned, and the proceedings of the court and sentence of condemnation produced to substantiate the loss; and in case of capture or detention by any other power, the like document shall be produced, until satisfactory reasons can be given that they cannot be obtained." Policy valued at \$9000. Insurance, \$8200.

Ward and Drayton, for the plaintiffs.

Pringle, Desaussure and Cheves, contra.

BREVARD, J., delivered the opinion of the court, consisting of GRIMKE, WAITES, TREZEVANT, and BREVARD, JJ. The principal question submitted to the court by the special verdict in this case is, whether the plaintiffs, under the policy of insurance, and all the circumstances of the case, had a right to abandon.

The clause in the policy, upon the construction of which the right to abandon is denied, is expressed in these words: "It is further agreed, that no abandonment of the neutral property hereby insured shall take place, in case of capture or detention by the British, until it be condemned, and the proceedings of the court and sentence of condemnation produced to substantiate the loss; and in case of capture or detention by any other power, the like documents shall be produced, unless satisfactory reasons can be given that they cannot be obtained."

The verdict does not state whether the capture and detention was by the British, or some other power; but it is understood, however, that it was not by the British. The opinion of the court is, that the true sense of the clause may be thus rendered: That no abandonment of the property insured shall take place in case of capture or detention by the British, until after condemnation; and not until the proceedings of the court, in which the condemnation shall be obtained, have been produced to the insurers, to satisfy them that the property has been condemned in due form; nor in case of capture or detention by any other

power, until the like documents have been produced, unless it should appear that they cannot be obtained. This seems to be the most natural and reasonable construction the words can receive. The whole clause should be taken and construed together. The intent seems to have been to qualify and abridge the general right of abandonment. The first part of the clause concerns captures and detentions by the British; the latter part concerns captures and detentions by other powers. The latter part cannot be understood without having reference to the former. For what purpose should the proceedings of court and sentence of condemnation be produced but to evince the right to abandon? And when but at the time the offer to abandon is made? There might have been reasons for the distinction made between the British and other powers. The difficulty of procuring the judicial proceedings of the British courts, might not have been so great as those of the tribunals of other powers from whom capture and detention might have been apprehended. But if the general right to abandon should be granted in this case, as unfettered by this clause in the policy, still I should be of opinion that the plaintiffs were not entitled to abandon. The verdict does not state at what time the offer to abandon was made, but only "that the plaintiffs, upon the first information of the capture and detention, offered to abandon." It does not appear at what time this first information was received; nor whether the plaintiffs did not, at the same time, receive intelligence that the vessel was released, and had proceeded on her voyage; and perhaps that she had arrived in safety at the port of destination. If such intelligence was received before the offer to abandon was made, and as nothing appears to the contrary, we may conclude that this was the case, the plaintiffs had no right to abandon, because the loss did not then appear to be total: Park, 145, 146; 2 Burr, 1, 214; 1 T. R. 191; Evans, 37.

It has been insisted, however, that as the insurance was upon the goods for the voyage, if it should appear that either the goods or the voyage were lost, it may be treated as total, provided there was a total loss at any period of the voyage; and that as the loss in this case was total at one period of the voyage, by reason of the capture, and as the voyage was in consequence thereof so far defeated that it was not worth pursuing, therefore it may be treated as a total loss, notwithstanding the subsequent release of the ship and cargo. But it does not appear that the voyage was so far defeated, by reason of any of

the perils insured against, as to have been not worth the further pursuit at the time of the offer to abandon. It is not stated when the offer to abandon was made. For anything that appears, it might have been after the vessel had arrived safe in port; after the peril was over and the goods in safety. If so, and we may presume that this was the case, the plaintiffs' had no right to abandon: 2 Burr. 1, 198; Park, 168. Besides as the right to abandon on this ground depends on the nature and extent of the damnification, and it does not appear in this case that the damage sustained was, in its nature and extent, sufficient to justify the plaintiffs in abandoning to the underwriters as in case of a total loss. I am of opinion they could not do it.

The next question submitted by the special verdict, is whether the extraordinary duties laid on the cargo or goods insured, while detained at Algesiras, should be considered as embraced by the terms of the policy and chargeable against the underwriters. The policy subjects the underwriters to responsibility on account of all the usual perils, comprehending "all unavoidable perils, losses and misfortunes to the damage of the goods." The peace duty did not affect the goods. It does not appear that they sustained any damage by the event complained of. They were subjected to a charge or duty, but this was a political event not insured against. The underwriters are bound to know every cause which may occasion natural perils and also all political dangers: Park, 195. The peace duty cannot be considered as one of the perils insured against. The court are, therefore, unanimously of opinion that the plaintiffs should have judgment for a ratable proportion of the sum of one thousand one hundred and fifty-two dollars, without interest. The delay of payment was occasioned by the plaintiffs' requiring more than was legally due to them; the defendants were not in default and ought not to pay interest.

Judgment accordingly for the plaintiffs.

PRICE v. DE PEAU.

[1 BREVARD, 452.]

MISREPRESENTATION AND CONCEALMENT. — A policy of insurance was effected upon a vessel, represented to be American, and furnished with American papers, but in reality owned by Spanish subjects, which fact was not disclosed to the insurers. The policy was held void from the beginning, on the ground both of misrepresentation and concealment; and the insured cannot recover, whether the loss were caused by the misrepresentation, or concealment, or otherwise.

MOTION for a new trial. The action was on a policy of insurance on a vessel from Charleston to New Orleans, effected by plaintiff for Captain Howe, as the owner of the vessel. The policy was taken in the name of Howe, who was known to be an American citizen, though in fact not the owner. The vessel was owned by Spanish subjects at Havana. The captain, the supercargo, and the plaintiff and his partner, were all the agents of the owners, and acted for them in taking out American papers, and in effecting insurance on the vessel. The vessel was masked, and the circumstances under which she was masked, were not disclosed or known to the underwriters. If they had been made known, the premium would have been enhanced. The action was tried before JOHNSON, J., and a verdict was found for the plaintiff, contrary to the instruction of the judge. In her voyage the vessel had liberty to touch at Havana. The premium was ten per cent.; one per cent. to be deducted if the vessel should go direct to New Orleans. She was boarded by a British sloop, and afterward perished at sea.

In support of the motion, it was argued: 1. That the policy was void on the ground of fraud, there having been a concealment of material circumstances; 2. That the representation on the policy amounted to a warranty, that both the vessel and cargo were American property; whereas it appeared that they were Spanish property.

On the other side it was conceded, that in general, a concealment of circumstances, materially affecting the risk, will vitiate the policy, but it was contended there are exceptions; that the insured is not bound to know whether the vessel or property is masked. There were many things which increased the risk, which need not be disclosed: *Murgatroyd v. Crawford*, 8 Dall. 491; Park. 182, 175, 320; Comp. 607, 787.

By Court, GRIMKE, TREZEVANT and BREVARD, JJ. The insured was bound to disclose the circumstances of the case, that were material in computing the risk. He did not disclose everything that he ought. He also misrepresented facts, he represented the property as American. The policy was void from the beginning. It is immaterial whether the concealment or misrepresentation was the cause of the loss of the vessel or not.

GAGE v. ALLISON.

[1 BREVARD, 495.]

LIEN OF FACTOR.—Where an agent or factor is intrusted with goods to sell, and pay a debt of his principal with the proceeds, he has only a qualified property in the goods, and his executors, after his death, cannot lawfully dispose of the goods, but may retain them for his lien.

RIGHT TO MAINTAIN TROVER.—The plaintiff, to maintain an action of trover, must appear to be entitled to the thing in question, and to be in the actual and constructive possession thereof, at the time of the conversion.

Motion to set aside nonsuit. The action was trover before JOHNSON, J. It was to recover forty-three barrels of coffee, which the plaintiff had deposited in the hands of one Clayton, the factor, to sell; and for which he took a receipt from Clayton in the following words: "Received, sixteenth March, 1802, forty-five barrels of coffee, which, when valued, to be sold on his account, and the net proceeds, after deducting amount of his account, to be subject to his order. (Signed.) M. Clayton." Clayton having sold two of the barrels of coffee, died intestate, leaving the forty-three barrels on hand, unvalued, and unsold. His administrators possessed themselves of the coffee, and sold the same. Before the sale, the plaintiff made a demand for the coffee; the defendants replied that they did not know that they had any coffee of the plaintiff to deliver. On this, the judge directed a nonsuit, on the ground that as Clayton had a qualified property, and a power to sell, coupled with an interest, it was such a power as would survive to his personal representatives, and, therefore, there was no proof of a tortious conversion.

Bailey, in support of the motion, cited 1 Str. 651; 4 Burr. 2214, 2219.

Cheves and Pringle, contra, claimed a lien on the coffee, on behalf of Clayton, and he had also a lien for storage. Whenever a party has a lien, he may retain in trover: 1 Burr. 494; 4 Id. 2211. The factor was authorized to sell and pay himself out of the proceeds; this power, coupled with an interest, survived to his administrators: 3 Vin. Ab. 436; 2 Mod. 317; 1 Id. 210. Therefore, trover is not maintainable: 7 T. R. 912. The power and the right to sell are convertible terms: Cowp. 819; Bull. N. P. 72. This power was not revocable: Esp. Dig. 581, 589.

By Court, BREVARD, J. The motion in this court is to set aside the nonsuit, and grant a new trial, on the ground that the judge who presided at the trial was mistaken in his opinion of the law on the point in question; and we are of opinion he was mistaken therein, and that a new trial ought to be granted.

To maintain trover, it must appear that the plaintiff had the actual or implied rightful possession of the thing, the subject of the suit. In this case, it appears the plaintiff was the rightful owner of the coffee in dispute when the demand was made, and had, therefore, the right of possession, for property draws with it the implied possession, although the owner have not actual possession. The defendants had only a special property in the coffee. They had a qualified right of possession only; Clayton himself had no more. The coffee was bailed to him for a particular purpose. He might have sold, as the factor or agent of the plaintiff, but he did not. The coffee he had to sell was a personal trust, which did not survive or go to his administrators. He might or might not have had a lien on the property, either on account of a previous debt, which was due him from the plaintiff, and payable out of the proceeds of the coffee when sold, or on account of storage, or other charges, which might be paid by him as factor, in respect of the coffee; but the nature or reality of any such lien has not been proved, but has been supposed, from the face of Clayton's receipt. But even admitting the defendants, as administrators, had a lien on the coffee, and might retain the same until the lien was discharged, yet they had no power or lawful authority to sell. The coffee in their hands has been compared to a pawn, or pledge. If the comparison should hold, yet it will not follow that defendants were entitled to sell the pawn, and by that means defeat the right of the pawnor to redeem his pledge, by paying the money for which the thing was pledged. A tender of the money due will discharge the pawnee's qualified property; but in this case there would have been no use or propriety in making a tender, when it was known that the coffee was sold by the defendants, and it was not in their power to deliver. They had willfully put it out of their power to deliver it, and by doing so, they committed an illegal act, which illegal act was a tortious conversion of the property in dispute, and makes them liable in this action.

Motion granted.

BEVIN v. LINGUARD.

[1 BREVARD, 508.]

APPORTIONMENT OF DAMAGES IN TRESPASS.—In an action of trespass for assault and battery against several defendants, who pleaded jointly not guilty, a verdict was found for several damages; it was held that the jury may in such case sever the damages and apportion them.

JOINT PLEA.—A joint plea may be considered as several, as well as joint, in order to the attainment of justice.

Motion for a new trial. The action was for an assault and battery on the plaintiff in his dwelling-house, and tearing down part of his house, throwing about his goods, etc. The defendants pleaded jointly the general issue. At the trial, before BREVARD, J., the plaintiff recovered a verdict for five hundred dollars, to be apportioned among the several defendants. The motion for a new trial was argued upon two grounds: 1. That the damages were excessive. But it appeared from the report of the judge who presided at the trial, that the trespass was exceedingly outrageous, and the damages were not thought excessive; 2. That the jury could not award several damages, as the defense was joint.

Desaussure and Cheves, for the defendants, cited: 5 Burr. 2700; 2 Bac. Ab. Tit. Damages. The case of *White v. McNealy et al.*, 1 Bay. 11, does not contradict the doctrine of the English cases on this point, for the report of that case does not state that the defendants pleaded jointly, and it ought to be presumed they pleaded several pleas: 1 Esp. Dig. 420.

Pringle, contra, contended that the practice here was different from that in England; the case of *White v. McNealy* is conclusive on this point. The defendants in that case pleaded jointly, and yet it was adjudged the jury might apportion the damages.

By Court, WAITES, BAY, BREVARD, and WILDS, JJ., were of opinion that the verdict ought not to be set aside: 1. Because if the objection to its being a finding of several damages against defendants jointly charged, and found jointly guilty, could be supported, yet the apportionment of the damages might be rejected as surplusage, and the finding of a gross sum by the verdict, which is afterward apportioned, might be considered as joint damages; 2. Because the jury upon such joint charge, may find the defendants jointly guilty, and yet apportion the damages according to their different degrees of guilt. This appears to have been the practice in this country for a long time past:

and it has not been found, upon experience, productive of any mischief or inconvenience; nor is it contrary to any principle of law. The case of *Hill et al. v. Goodchild*, in 5 Burr. 2790, was decided upon full argument and consideration; but yet no principle of law is stated as the ground of the decision, nor any strong reason for it, except that it was warranted by former determinations. The court seemed to think that because the trespass was joint the damages must of necessity be joint also; admitting that if the defendants had been charged jointly and severally, they might have been found severally guilty, and the damages apportioned; and also admitting that there was a great confusion in the cases upon the subject. The practice and rule of law in England upon this point does not seem so well adapted to answer the real justice of such cases wherein the point occurs as the practice of our courts, which has established a different rule of law, by which the jury are authorized to assess damages according to the different degrees of guilt, although the trespass should appear to be joint where the defendants are jointly charged, yet they may plead severally; for no man can be compelled to combine his defense with others; and if they plead severally, the jury may, according to the English authorities, sever the damages: 2 Str. 1140. But a joint plea may be considered as several as well as joint, in order to the attainment of justice.

Motion refused.

CASES
IN THE
COURT OF CHANCERY
OF
SOUTH CAROLINA.

GIVENS v. CALDER.

[3 DECAUSURE, 172.]

SPECIFIC PERFORMANCE OF PAROL AGREEMENT DENIED.—A specific performance of a parol agreement for the sale of land, will not be decreed against the heir of the vendor, though he had given instructions in writing, stating the terms to an attorney to draw the deeds of conveyance.

INSUFFICIENT WRITTEN AGREEMENT.—Where deeds were drawn, and the vendor took them home and wrote to the vendee that the deeds were ready, and requested her to attend and settle the business, but he died before the parties met, it was held not to be such an agreement in writing as will take the case out of the statute of frauds, as the letter did not distinctly set forth the terms of the agreement, or refer to a written instrument in which they are set forth, and that the party accepted such terms.

PART PERFORMANCE INSUFFICIENT.—The person contracting to purchase, having deposited part of the purchase-money with her agent, to pay the vendor as soon as he executed the deed, and the agent informing the vendor of it, is not such a performance as takes the case out of the statute; nor does the purchaser taking possession of the land, without any known permission of the vendor, make such a part performance.

STATUTE OF FRAUDS NEED NOT BE PLEADED.—If a defendant choose to avail himself of the statute, it is not necessary that he should by answer, confess or deny the parol agreement alleged in the bill, the law having declared it void.

BILL for the specific performance of a contract for a tract of land alleged to have been made by the complainant, Givena, as the agent of Agnes Kelsal, with Dr. Calder, since deceased. The tract contained eight hundred and eighteen acres, and the consideration, as alleged, was two hundred and eighteen pounds cash, and the remainder, six hundred pounds, in one, two and three years.

The principal question in the case was, as to how far a part performance would take a parol contract for the sale of lands out of the statute of frauds.

The facts in the case fully appear from the opinion of the chancellor.

Alston, Ward and Pringle, for the complainants, maintained that the contract was perfected, and ought to be carried into specific execution, and cited: *Stapley v. Butcher*, 1 Vern. 364; *Pike v. Williams*, 2 Vern. 456; *Lacon v. Martins*, 3 Atk. 1; *Only v. Walker*, 3 Atk. 407; *Welford v. Beasly*, 3 Atk. 503; *Tawney v. Crowther*, 3 Bro. C. C. 162; *Foster v. Hale*, 3 Ves. Jun. 696; *Powel*, 291; 1 Fonb. 171 (*notis*), 168, 182; 1 Atk. 8, 13; 4 Ves. Jun. 686.

Desaussure, Ford and Walker, for the defendant, contended that this case ought to be examined on two grounds: 1. Under the operation of the statute of frauds; 2. Under its own circumstances.

1. Under the statute, it has been decided that if an agreement be by parol, and not signed by the parties, or by some one lawfully authorized by them, and if such agreement be not confessed in the answer, it cannot be carried into execution. So, if carried into execution by one of the parties, as by delivery of possession, and such execution be accepted by the other, he that accepts it must perform his part: 1 Fonb. 165, *et seq.*

The three important circumstances are: 1. The signing by the parties; 2. The confession in the answer; 3. Or if possession has been delivered by one party and accepted by the other as an execution of a complete, or by such other acts as amount clearly to part, performance; but in this case none of these are found. Dr. Calder signed nothing; his brother and heir does not confess the agreement to be complete; no possession was delivered, but was taken after the death of Dr. Calder; and the payment was equivocal. As to what the law construes a signing, they cited 1 Fonb. 165, 178; *Hawkins v. Holmes*, 1 P. Wms. 770; *Whaly v. Bagenal*, 6 Bro. P. C. 45, 55. Parol evidence was inadmissible to prove the agreement: *Brodie v. St. Paul*, 1 Ves. Jun. 326, 330; or to prove a variation of agreement: *Jordan v. Sawbrien*, 1 Ves. Jun. 402; *Pym v. Blackburn*, 3 Id. 34. The cases which, upon equitable grounds, have been exempted from the operation of the statute are: 1. Where in consequence of fraud the provisions of the act have not been complied with: 1 Vern. 296; 1 P. Wms. 618; 1 Ves. 123; 2

Vern. 506; 2 Atk. 98; 3 Id. 338: Amb. 67. 2. Where the agreement has been in part performed by delivery of possession, payment of money, etc.: *Butcher v. Stapley*, 1 Vern. 363; *Pike v. Williams*, 2 Id. 455; *Whitechurch v. Bevis*, 1 Ves. 82; 1 Fonb. Eq. 175; *Clerk v. Wright*, 1 Atk. 12; *Lacon v. Mertins*, 3 Atk. 14. 3. Where the answer admits an agreement: *Mortimer v. Orchard*, 2 Ves. Jun. 243.

In this case the answer denies that the agreement is complete. The confession of an agreement in the answer must be complete to take it out of the statute of frauds: 1 Fonb. Eq. 167, 8, 9. Now all the cases of part performance are made to turn upon the point that one party permitted the other to act on the parol agreement: 1 P. Wms. 770. The general rule is (1 Fonb. Eq. 175) that the acts must be such as could be done with no other view or design than to perform the agreement, and not such as are merely introductory or ancillary to it: *Gunter v. Halsay*, Ambler, 586; *Whitebread v. Brockhouse*, 1 Bro. 412. But giving directions for conveyances and going to view the estate are not: *Clerk v. Wright*, 1 Atk. 12. We contend, secondly, that under the circumstances of the case, and independently of the statute of frauds, it is in the discretion of the court to refuse to enforce this pretended agreement, on the ground of the incompleteness of the agreement, and on the uncertainty and on the inadequacy of price, and on alteration of circumstances: 1 Fonb. Eq. 178; *Cooper v. Denne*, 1 Ves. Jun. 565; 3 Id. 184; *Lord Walpole v. Lord Orford*, 3 Id. 420; 1 Fonb. Eq. 116; 2 Bro. P. C. 396; 1 Fonb. Eq. 384.

Chancellor RUTLEDGE delivered the decree of the court.

The complainant's bill states that he, as the agent of Mrs. Kelsal, now deceased, in July, 1797, entered into a parol agreement with Dr. W. Calder, now also deceased, for the purchase of a tract of land on the terms and conditions in bill set forth. It states further, as a part performance of the agreement, that the sum agreed to be paid down was deposited with the complainant's agent, to be paid to Dr. Calder, when he should execute and deliver the titles to Mrs. Kelsal. Also that Dr. Calder assented to Mrs. Kelsal taking possession of the land (which she did) and preparing for the next crop, if she thought proper; that Dr. Calder went soon afterward to Charleston, had titles drawn, and shortly afterward he returned home, viz: in the month of August, and died without completing his contract. The bill, therefore, prays a specific performance by defendant as the representative of Dr. Calder.

The defendant in his answer says he is entirely ignorant of any agreement made by Dr. Calder with complainant as agent of Mrs. Kelsal for the land, and therefore can neither admit nor deny the charges in the bill. That being at any rate only a parol agreement, it is void by the statute of frauds. The defendant is ignorant of Dr. Calder's agreeing to Mrs. Kelsal's entering on the land previous to his making titles thereto; but has been informed that neither she nor her agent entered thereon till some time after Dr. Calder's death. He does not admit the deposit of the money as a part performance, and denies that it was ever tendered to him, or that complainant offered to fulfill his contract till a considerable time after defendant arrived in this country. The defendant not having confessed the agreement, nor admitted the allegations of part performance as stated in the bill, either of which would have been sufficient to induce the court to decree a specific execution of the agreement; because, where defendant confesses the agreement or acknowledges part performance there is certainly no danger of fraud or perjury, which were the objects contemplated by the statute, it was necessary for the complainant to support his case by proof. This he has attempted to do by the adduction of parol evidence as to the part performance: first, by payment; next, by delivering possession of the land, and thereby to take the case out of the statute. He also attempted to prove by parol evidence the contents of a letter written to him by Dr. Calder; but that not being admitted, the counsel on both sides went into the cause and argued the case very fully. The complainant, immediately after the first hearing, filed a supplemental bill, wherein he recites the letter alleged to have been written by Dr. Calder to complainant, and calls for an answer from the defendant, whether he has not seen such a letter in Dr. Calder's handwriting. Defendant by his answer acknowledges that the complainant had shown him a letter which he believed to be in the handwriting of his brother, though he had not seen or corresponded with him for many years. The letter in substance is to inform complainant that all the writings for the land he had bought were ready, and the sooner he came and settled the better; and desired Mrs. Kelsal should go with complainant and take her security with her. The parol testimony of Mr. Fickling was produced to prove that he had seen the letter, and had a conversation with Dr. Calder about the sale of the land, and giving possession to the complainant; but he does not positively swear that Dr. Calder

told him he had given possession to complainant, nor does he know if Dr. Calder was present when complainant took possession, or that he gave complainant authority to take possession. Mr. Whaley, on the part of the defendant, swore that Dr. Calder was on his way to Charleston, in August, 1797, slept at his house, and informed him that he was coming to town to see Mr. W. Simmons, and to learn from him whether he had declined the purchase of the land now in contest; complainant having informed Dr. Calder that Simmons had declined it; that if Simmons had not told complainant so, he should have the land if he thought proper; that Whaley was with Dr. Calder, after his return, during the greater part of his illness, and when he died; he never saw either complainant or Fickling there, and does not believe they saw the doctor after his return. Mr. Simmons swears that he not only had not made such a declaration to complainant, but that he had not seen nor ever heard of complainant.

The cause has been reargued on the supplemental bill and letter, and the argument ought to have been confined simply to the point whether the letter written by Dr. Calder to complainant varied the case without going into parol proof possession. In determining this case we must reverse the order of things and take up the last question first, by disposing of the letter set forth in the supplemental bill and determining whether it varies the case. According to adjudged cases it is clearly held that in order to make a letter evidence of an agreement for the sale of lands to take it out of the statute, it ought distinctly to set forth the terms of the agreement, or at least refer to some written instrument in which the terms are set forth, and that the party accepted such terms. Does the letter alluded to specify anything? It does not. It only informs complainant that the deeds were ready when Mrs. Kelsal was disposed to perform her part. There was no obligation on her to do it. No evidence has been offered to show even that she authorized complainant to negotiate the business. There was therefore no mutuality of contract. That letter then, though the contents are admitted, does not vary the case. As to the delivery of possession there is no actual proof of it, for complainant's own witness does not positively swear that Dr. Calder told him either that he had given or even authorized complainant to take possession. And from the evidence of Whaley and Simmons, it is rather to be presumed that no possession was ever given or even authorized. The case therefore stands precisely on the same

grounds it did upon the argument on the original bill and answer.

It is a singular case and there is not one like it in the books, for the parties to the agreement, seller and purchaser, are both dead, and the person who now comes forward to claim a specific performance of the agreement in his own right as the residuary legatee was the agent of the purchaser. It rests with him to make out such an agreement as best suits himself, and that too against a person who could not possibly know anything of the transaction, being a total stranger in this country. We do not mean to charge complainant with suggesting in his bill any untruths; but a case of this sort may occur, and it would be scarcely possible for a defendant circumstanced like the present to controvert the facts if parol evidence was to be admitted. If ever there was a case, therefore, in which the statute should be rigidly adhered to, and the party have the benefit of it in the greatest latitude, it is the present.

The judges of the court of equity were formerly very astute in laying hold of circumstances in order to enforce parol agreements, and to take them out of the statute, whereby it is problematical whether they have not done more injury than real good. For though by strict adherence to the letter of the statute, a present inconvenience might have been sustained, the mischief would soon have worked its own cure, and the parties would have reduced their agreements to writing, agreeable to the directions of the law. There would not then have been so many cases on this subject, various in their circumstances and the decisions on them (as has been observed by a very ingenious writer) not immediately reconcilable. The modern adjudications, however, are corrective of the former; and we find judges of the present day, declaring the bent of their minds strongly in favor of the wisdom of the statute, and against the cases that have intrenched upon it, and accordingly framing their decisions conformable to the intention as well as the letter of the statute. The question now before the court, we believe, has never been fully discussed. The present decision will, therefore, establish a precedent, and with it the law on the subject. The numerous cases that were cited have been carefully reviewed, and after mature consideration of them, we are clearly of opinion, that in case of parol agreement, not tainted with fraud, if the defendant choose to avail himself of the statute, it is not necessary that he should by answer confess or deny the agreement, the law having declared it void. Neither

ought he to be compelled to confess or deny part performance of it, although charged in the bill. That to permit parol proof of a parol agreement would be in effect to repeal the statute, and introduce all the mischief, inconvenience and uncertainty it intended to prevent. That to admit parol proof of part performance of a parol agreement would be equally improper, and is not warranted by any of the cases in the books; for it is clearly held, that if the part performance alleged be possession of land, or the payment of money, the complainant must prove delivery of possession in the first case, or receipt or written evidence of payment in the other to entitle him to a specific performance of the agreement. All the parol testimony, therefore, which has been adduced in the case to prove the parol agreement of the part performance of it, is made inadmissible, and must be laid aside.

The case thus standing without proof on the part of the complainant, the facts of part performance, namely, payment of part of the purchase-money and delivery of possession, not being admitted, but denied by the answer as fully and explicitly as defendant could do so.

The bill must be dismissed with costs.

BUTLER v. HAMILTON.

[2 DESAUSSEURE, 226.]

RELEASE OF SURETY.—If the creditor extend the credit to a longer period, against the will of the surety, the latter will be discharged; but it must appear that such credit was given either expressly or impliedly against his consent or inclination, or that he was prejudiced thereby.

SAME.—A surety on certain bonds is not released merely on the creditor not urging his demand. There must be an express extension of credit to the principal. If one of the bonds has been prosecuted to judgment and an execution returned *nulla bona*, there is, therefore, less necessity to sue on the others.

BILL filed to obtain relief against the liability of the complainant on three bonds executed by him, together with one Daniel Bordeaux, and as his security to the commissioners of the treasury. The bill stated that on the fifth of —, 1787, complainant became surety on three bonds as surety for Bordeaux, now deceased, payable to the treasurers and their successors in office; and each bond conditioned for the sum of seven hundred and eighty-one pounds eleven shillings and eight

pence, with interest from date; that the bonds were payable in three annual installments, to-wit: On the twelfth March, 1788, 1789, 1790; that the bonds were not signed by one Atkinson, as they were to have been, and that it was incumbent on the treasurers to have procured the signature, as the name of Atkinson was inserted in the bonds.

The bill further stated that judgment was obtained on the first bond against Bordeaux and the complainant in 1789; that no proceedings were ever taken on this judgment or on the other bond against either Bordeaux or the complainant, and the latter believed that all the bonds were paid by the said Bordeaux, the principal, until Hamilton, the controller, applied to complainant for payment; that after the bonds were due and payable, the complainant applied at the treasury to learn if they had been paid, and was informed they could not be found and must have been paid; that this application was made expressly to find if the bonds were paid, he then having it in his power to obtain indemnity from Bordeaux; that by reason of such neglect and laches on the part of the public officials, and the non-insertion of the name of Atkinson, as was originally intended, it would be unreasonable to hold the complainant liable on the bonds. It further stated that the complainant holds by assignment certain lands of Bordeaux as security to indemnify for his liability and that the proceeds of these lands, when recovered, he is willing to pay on account of those bonds in preference to indemnifying himself. The bill then prayed that the complainant's name may be struck out of said bonds, and that he may be fully relieved in the premises.

The answer of the defendant admitted the execution of the bonds, but claimed ignorance of the other facts charged.

Gaillard and Parker, for complainant, argued that as Atkinson's name was not inserted, the complainant was discharged: 1 Pow. 316; 2 Id. 106; Loft, 113; that the principal had not been pressed for ten years, which was an indulgence that the creditor had no right to give at the risk of the security: 2 Bro. C. C. 579; 2 Ves. Jr. 540; 4 Id. 824; 3 Atk. 80.

Pringle, attorney-general, on behalf of the state, argued that with regard to one of the bonds there could be no doubt, as suit was had on it when due, and due diligence used; and it would have been useless to pursue the principal on the other bonds, as he was insolvent, and *nulla bona* returned on the execution on the first bond; that leaving out Atkinson's name did not affect the complainant. To obtain additional security, was merely intended to strengthen the security of the state.

Chancellor RUTLEDGE delivered the decree of the court: This is a case of the first impression, and of considerable magnitude, as it relates to the moneyed interest of this country. It has never before been fully discussed, therefore the court took time to deliberate on it. It has been heretofore a generally received opinion that the principal and security in a bond were at all times equally liable for the payment of the debt, as long as the bond existed; and under that impression, payment has never, till lately, been resisted by the security when called upon. Some modern adjudications in the court of chancery in England have, however, shaken former opinions; and it is now settled that the security is not liable to the extent it was believed; and that a court of equity, under peculiar circumstances, would give relief, and has actually given it in several cases. It was never doubted that a security had a right to call upon the obligee to sue the principal and obtain payment of the debt from him, and if he refused to do so, by an application to this court, the obligee would be compelled to bring suit for that purpose. The grounds for relief in equity, in the case of sureties, are various. That the obligee has not used due diligence to recover his debt from the principal in the first instance, and has refused or neglected to comply with the surety's request to use that diligence. Also, that the creditor has extended the credit longer than the parties contracted for, against the surety's consent. The second ground is the strongest; it is on that, and that only, that the court has uniformly determined in favor of the surety. All the cases are bottomed on that principle, that the surety is only responsible for a limited time; and if the obligee will extend the credit to a longer period, against the will of the surety, he shall be discharged; for it is both unreasonable and inequitable, that a man should always have such a cloud hanging over him. No one could say what estate he had left for his family if he was to be liable beyond the time he contracted for. His estate might continue to be so in the hands of his heirs or legatees to the most distant period. The plain, simple question then is, whether the complainant, from the peculiar circumstances of this case, is entitled to relief on the principles of the adjudged cases? With respect to the first bond, there is not the smallest ground whatever for relief; because it was put in suit, and judgment and execution obtained against him and Bordeaux, the principal, as soon as it could possibly be done. What availed the due diligence? Was any part of the debt received in consequence

of it, from Bordeaux? Not a penny. Was he in a situation to pay? We presume he was not. For what purpose, then, sue the other bonds? Did the complainant ever apply to the treasurer to do it? It does not appear that he ever did; and for the best of reasons, because it would not have advanced his interest, and would have been attended with additional expense. When he made the application to the treasurers to know if the bonds were taken up is not stated, nor is it a material circumstance, because he could have got the information from Bordeaux himself; and from the complainant's own confession, as stated in his bill, he had ample means in his own possession to secure himself completely. He knew judgment had been obtained against him on one bond. It was therefore his interest to see that that was satisfied in the first instance, and also the other bonds afterward, and before he parted with the funds he was possessed of. If he gave up some of them to Bordeaux, without having ascertained whether the bonds in question were or were not taken up, and has made a bad bargain in the disposition of the rest, he has only himself to blame. The negligence of the public officers ought not to be used as a shield to protect him against his own supineness.

Upon the whole, the court are unanimously of opinion that the complainant is not entitled to relief on the ground of negligence, with regard to the first bond, because due, but unavailing, diligence was used to recover the money on that. Nor is he entitled to relief on the other bonds, upon the ground of extending the credit beyond the time contracted for, because he has not made it appear that such credit was given either expressly or impliedly against his consent or inclination. This case, therefore, is not similarly circumstanced, nor does it come within the reason or equity of the lately adjudged cases. And lastly, because, from complainant's own confession, it appears he was fully indemnified for his suretyship by the funds deposited with him for that purpose, if he had made due and proper application of them.

The bill must be dismissed with costs.

This case was affirmed in *Rutledge v. Greenwood*, 1 Desaus. 389, which was decided on its authority. It was there determined that general indulgence given by a creditor to the first signer of a bond, will not release the other obligors, even if they were mere sureties; that there must be a new agreement, varying the terms of the contract, and extending the time of payment to have the effect of a release to the surety. A demand of the surety to sue the principal will not release the surety, if the creditor offers to sue all the obligors, but is declined by the surety.

READ v. GAILLARD.

[2 DESAUMURES, 552.]

EQUITABLE LIEN.—A person obtained the indorsement of another by promising in a letter to give him a bill of sale on certain personal property as security; before giving the bill of sale he died, and the indorser was obliged to pay the note. It was held that the indorser was entitled to an equitable lien on the property in preference to other creditors.

BILL filed to establish a lien on certain personal estate, founded on a written promise made by the defendant's testator to give a bill of sale of the same as a security to complainant. It stated that the late Thomas Simons, on or about the twenty-ninth of October, 1804, wrote a letter to the complainant containing the following: "I am in want of two thousand dollars for a short time; you will much oblige me by lending me your note for that sum, which I will endeavor to have discounted, and I will give you a bill of sale for my schooner and hands to reimburse you in case of my death, or other accident, so that you may not be put to the least inconvenience." Agreeably to this request, and relying on the promised security, the complainant lent his note, which was discounted, and the proceeds received by the said Simons. The note was renewed at the end of sixty days, for the same amount, and before it became due Simons died; and the complainant was obliged to pay the note, and has not since been reimbursed. The schooner referred to was the Mary and Susan, and those employed were four negroes, belonging to Simons. After the latter's death, the complainant applied to the defendant as administrator, and requested him to pay the said two thousand pounds, with interest, or to deliver up the schooner and negroes to be sold for payment, but he refused, and converted the proceeds to another use. The complainant prayed that defendant should render account of the said schooner and negroes, and be compelled thereout to settle the demand.

The defendant admitted the letter, but said it was without date; that Simons frequently had notes of complainants discounted, and referred to accounts filed with his answer; he believed the schooner and negroes to be the same as stated in the bill; admitted the application for payment, or delivery of the property, and refusal, saying the estate of the intestate was insolvent, and was, therefore, bound to pay the debts as prescribed by law. He claimed that it appeared by accounts filed with his answer that the complainant is indebted to the estate, which debt ought to be set-off.

Pringle, for complainant, argued that the letter gave a right to a lien; it was, in fact, equivalent to a mortgage; it was an equitable lien which equity would enforce. The court would consider that done which ought to be done.

Gaillard, for defendant, insisted it was a mere promise, and did not amount to a lien. The intestate never gave the bill of sale, and the complainant never required it. It would be dangerous to set up these latent liens, as it was opening a door to fraud, and it is opposed to the policy of the law which prescribes publicity. It would also tend to defeat the regular administration of estates according to the order prescribed by law.

Chancellor JAMES delivered the decree of the court: Complainant states in his bill that the testator of defendant, in his lifetime, being in want of two thousand pounds, to pay his debt at the South Carolina bank, applied by letter to complainant to lend him his note for that amount, and promised that he would secure him by giving him a bill of sale of his schooner and his working hands on board. That complainant lent defendant his said note, and the defendant died shortly afterward, and complainant has since been obliged to pay the same. Complainant seeks payment, and to have his equitable lien on said schooner and hands established by the court. Defendant states that the estate of his intestate is insolvent, and that he is bound to pay the debts in the order prescribed by law; he also charges that complainant is indebted to the estate of Thomas Simons. In this case it does not appear from any evidence that there was any mortgage, judgment or incumbrance upon the estate of Thomas Simons which could claim priority to the demand of complainant. It is indeed stated that Thomas Simons, before the date of his letter, had prevailed upon defendant to become his indorser to a great amount at the bank which he has since been obliged to pay. Then at the bank, complainant and defendant have both been obliged to pay notes, and at law would have both stood upon an equal footing, had it not been for the preference given to the complainant by Thomas Simons in his lifetime. That he had it in his power to give such preference cannot be denied; nor can it be doubted, while courts of equity are guided by that important rule of considering what ought to have been done as done, that complainant has an equitable lien upon the schooner and hands for the payment of his demand. The intestate says in his letter: "I will give you a bill of sale for my schooner and hands to

reimburse you." The bill of sale must then be considered as made.

Therefore, let the amount of the sale of said schooner and hands be appropriated toward paying off the demand of complainant, except the discount hereafter mentioned; and let the overplus be paid to the defendant to be administered by him according to law. And let it be referred to the master to ascertain whether complainant was indebted to the intestate, and if so, let that sum be set off against his demand so far as it may go.

RAMSAY v. BRAILSFORD.

[2 DESAUSURES, 582.]

SPECIFIC PERFORMANCE.—Where the complainant seeking specific performance of a contract for the sale of land, has failed to perform a precedent condition on his part, the court will not decree specific performance, if any injury has resulted to defendant for such non-performance; but the defendant having taken possession of the land, and paid part of the purchase-money, and executed the agreement in part, the court will consider him as having waived his objections to the complainant's default, and will decree a specific performance of the contract.

BILL for the specific performance of an agreement for the sale of a tract of land in Georgia. The bill stated that Hamilton, as trustee for Martha Laurens, had the legal seisin of one-third part of a tract of land called Broughton Island, situated in the state of Georgia, devised to her by her father, with the power to sell the same with the assent of the trustee; and the said Hamilton gave his consent to the sale thereof about the twenty-first December, 1803; that an agreement was entered into with Brailsford, in substance, as follows, viz.: David Ramsay and Martha Laurens Ramsay agreed to sell Brailsford their remaining one-third of Broughton Island, and to deliver Brailsford two bonds given to their trustee by Fabian; he, Brailsford, agreeing to give Hamilton a bond including the principal of the said two bonds, payable on the first day of March, 1805, and to give the trustee a further sum of four thousand pounds for the said one-third of Broughton Island, payable in four equal installments, with interest, at the period stated in the contract. The bonds were to be secured by a mortgage on the whole of Broughton Island; titles to be executed as soon as possible. but the titles on the one side, and the bonds on the other, to be retained until it was certified that the mortgage was duly

recorded, and no prior lien whatever on said island. It was further agreed that the interest due on the bonds of Fabian should be paid in cash or in notes, and that a year's interest should be advanced at a fixed discount on the four bonds given for the purchase of the island. In consequence of this agreement, it was averred that Brailsford entered on the premises, and kept possession thereof; and although complainants are now, and have been at all times, ready to perform their part of the agreement, and have long since had titles drawn, and executed by the trustee, yet defendant has prevented the agreement from being carried out; and although he had paid complainant the sum of two thousand and four dollars and twenty cents, yet that sum is not as much as defendant should have paid in cash, and defendant refused to pay the remainder. The defendant neglected to secure the complainants by mortgage as agreed, or to produce a certificate that there were no incumbrances. That complainants have applied to defendant to comply with the agreement, but he has refused to do so. The bill prayed for a *ne exeat*, and for relief.

The answer admitted Hamilton seised of the land in question in the manner as stated, and that one of the complainants, Martha Laurens, is entitled to an equitable estate; admitted the agreement stated in the bill, and that he may have been informed of the assent of the trustee, but avers the first regular notice he had of the assent, was a letter dated March 27, 1806. He admitted that he entered on the said island soon after making the agreement, but not under the contract, but under an agreement with the administrator of Fabian for the other two-thirds of the island. He denies that complainants have always been ready to perform their part of the agreement, as the bonds of Fabian had been retained by them, although defendant, on his part, had paid the interest thereon, and one year's interest on the bonds to be given by him. That the complainant, David Ramsay, had hindered the performance of the contract, by informing the administrator of Fabian that defendant had not paid up the cash, which he was to have advanced, and that the complainant looked solely to the administrator of Fabian for payment of the bonds in complainant's hands; the titles to one-third of the island had not been executed. He admitted his not having given a clear title to the whole island, as to enable him to give a mortgage of the same, because certain judgments were obtained against Fabian's estate, which render it impossible to comply with the contract. He contended

that the default of the complainants' not delivering the bonds was much greater than his, in respect to the mortgage; he had fully complied with the agreement as to the cash payments; and it was mutually agreed, notwithstanding the express words of the contract, that whenever the cash payment was made, the titles and bonds were to be delivered to the defendant. He admitted that complainants did, by letter of twenty-fifth and twenty-seventh of March, 1806, propose to release defendant from that part of the agreement respecting the mortgage of the whole of the island, and in lieu thereof to receive a mortgage for one-third, but yet they refused to deliver up Fabian's bonds. Defendant claimed that the subject-matter of the bill was not a case for a specific execution, but rather for damages, and he was willing to have the amount of damages assessed by a master, taking into consideration the rent of the island, and the money advanced by defendant. He denied all combination, and prayed to be dismissed with costs.

Ramsay, for complainants.

Parker and Drayton, for defendant, insisted that they might well except to the jurisdiction of the court to decree the specific performance of a contract for the sale of land in Georgia, beyond the jurisdiction of the court; and also that they might require the complainant's bill to be dismissed, as he had a remedy at law; but being desirous to obtain a final decision on the merits, they waived both these objections. As to the merits, the plaintiffs are not entitled to a specific performance, as they had not complied with the terms of the contract, in not delivering to the defendant the bonds of Fabian. On the other hand, the defendant had done everything in his power to comply with his agreement; he had paid the interest due on the bonds, and on his own contract, though he got no benefit from it; the bonds of the defendant were not to be delivered to the complainant until the titles were delivered him, which had never been done yet. The delay and the injury resulting to the defendant ought to prevent a decree for a specific performance, leaving the parties to their legal remedies. They cited 4 Ves. Jun. 690; 1 East, 627; and *Givens v. Calder*, ante, 686.

By Court, JAMES, Chancellor. The complainants in this case pray for a specific execution of a contract made with the defendant for the sale of one-third part of Broughton island, of which they state the defendants to have been in possession ever since a short time after the date of the said contract, to wit, on the

twenty-first of December, 1803. The defendant insists that the said contract should now be rescinded, because the complainants prevented him from complying with the same by not delivering to him J. Fabian's bonds, as he alleges they were bound to do by the contract, previous to his taking any steps to comply with the contract.

[The court then took a full view of the contract and of the conduct of the parties under it, and declared its opinion to be that the complainants were bound to have delivered the bonds of Fabian to the defendant when he made the payments which he actually did; and that certain ill consequences having resulted to the defendant from the complainant's not having delivered these bonds, the court could not have decreed a specific performance of the contract if the matter had rested there. But the decree for specific performance does not now depend upon the mutual stipulations of the contract, for it appears that the defendant took possession of the land with complainant's permission shortly after the date of the agreement. That he has remained in possession ever since, and has also paid the interest which he was bound to pay by the terms of said agreement.]

Therefore he has in part executed the contract and by his own act has waived the mutual stipulation, and it is too late for him now to say to complainant, you have not performed the condition precedent, and therefore are not entitled to a specific performance. But as the complainants by their own act in pressing for the payment of the bonds of Fabian, and threatening suit, when in equity they ought to have tendered the same to defendant, have thereby indirectly compelled the administrator of Fabian to eject the defendant from the other two-thirds of the island, and rendered it impossible for him now to mortgage the same; therefore the court will only direct him to give four bonds for the purchase-money of the remaining third, and that he do mortgage the said third. But as defendant has paid to complainant all the interest due on Fabian's bonds to the first of March, 1805, and one year's interest in advance on the purchase-money, that he be allowed the amount of the money so paid on Fabian's bonds with interest thereon from the time he paid it, as a part of his purchase-money; and that the same be deducted from the first bond, which he is hereby decreed to give to complainant's trustee. But as it appears by a letter of Mr. Harford as early as the twentieth of August, 1805, "that Dr. Ramsay had written two letters to Mr. Elliott, urging him

to make speedy arrangements to take up his bonds," and the first letter from the trustee, Paul Hamilton, threatening to sue, is not due until the third of September, 1805, it appears to the court that the conduct of Dr. Ramsay, in particular, has not been equitable:

1. In not offering to deliver the bonds of Fabian, thereby to ascertain if defendant could comply with his part of the contract; and in constituting himself the judge of his ability to comply with the same;

2. In making use of those bonds knowingly (for by the letter of Brailsford above cited, he ought to have known it), as the indirect means of evicting defendant from the other two-thirds of the island, and thereby lessening the value of the remaining third.

Under all these circumstances, it appears to the court that defendant is entitled to some favor.

It is therefore decreed that the complainants do make to the defendant good and sufficient titles for the said third of Broughton Island, and that the defendant do give bonds and a mortgage of the premises. The bonds to be made in the following manner, viz.: the first bond for the balance of the first installment, if any, as above directed, payable on the first March, 1809, when the last installment was to have been paid; and the three remaining bonds payable in the three following years, viz.: 1810, 1811, and 1812.

Moreover, as the use of said lands enjoyed by the defendant ought to be adequate to the interest of the purchase-money, let the said four bonds draw interest from the time that defendant took possession of the lands with permission of complainants. Also, let it be referred to the master to ascertain the time of defendant's taking possession; to liquidate the several sums, and to take bonds and mortgage on the principles above established.

DECISIONS
IN THE
COURT OF APPEALS
OF
KENTUCKY.

BRADLEY v. BUFORD.

[SERIES, 12.]

PROOF OF FRAUDULENT CONVEYANCE.—Direct proof of a combination in a conveyance to defraud creditors, cannot, in general, be expected; but from all the circumstances attending the transaction, the court may infer the conveyance to be fraudulent.

WHAT CONVEYANCE FRAUDULENT.—A conveyance of all the vendor's property and choses in action, especially when secretly made, will be considered fraudulent as to creditors.

CREDIBILITY OF PARTIES AS TO INDEBTEDNESS.—The vendee in a conveyance purporting to be made to secure his debt, having permitted the vendor to assert in his presence, that there was nothing due him, without contradicting him, destroys the credibility of the answers of the vendor and vendee to a bill, where they assert the existence of such indebtedness.

RELIEF ON SETTING ASIDE FRAUDULENT CONVEYANCE—Upon setting aside a fraudulent conveyance, the vendee will be permitted to show the real amount due him from the vendor, and to share *pro rata* in the proceeds of the property, upon condition, however, that he first surrenders all property which has come into his possession under the conveyance.

By Court. It appears that Robert Smart and George Smart, two of the defendants in the court below, on the thirteenth day of February, 1799, executed a deed of conveyance to Robert Bradley, another of the defendants in that court, now the appellant in this court, for certain property therein specified; and likewise for all and every other species of property, debts, dues or demands which the said Smarts then had against all and every person or persons, with all joint and separate real and personal estate, and which expresses to be for and in consider-

ation of twelve hundred pounds. And it further appears, that this suit was brought to annul the said deed on the charge of its being made in consequence of a combination between the parties to defraud the appellees of debts due to them from the Smarts.

Of this fraudulent combination there is no direct proof, and in such a case it can hardly be expected; but it seems to the court that the case was attended with a variety of circumstances, which taken together amount to evidence equally satisfactory, some of which the court will recite: A conveyance of all a person's property, such as the one in question, has always been considered fraudulent as to the creditors, both in the vendor and vendee. And when such a conveyance is secretly made, the fraudulent combination is thereby rendered more certain as well as more dangerous. In the present instance, it is true that the deed of conveyance was not long concealed after it was actually executed; but the appellant states, in his answer, that a conveyance of the kind had, for near two years and a half before, been agreed on between him and the Smarts, and had been relied on by him as a security for being reimbursed the value of large advances of money, goods and personal services, which during that period he alleges were rendered by him to them; and as it is not even pretended that this expectation or reliance was revealed to any other person, the effect, as to the other creditors of the Smarts, was the same as if the conveyance, or one similar to it, had been executed when the agreement was first made; and the fraudulent intent is equally certain; more especially, when from the nature of the services which the appellant states he performed for the Smarts, if it is not certain, at least the presumption is violent, that he knew they were obtaining credits and indulgences for large sums of money from those who relied for payment on the very property which he considered as his own, yet suffered to remain in their possession.

Wherefore, it is decreed and ordered, that the decree of the said court of quarter sessions, in this cause pronounced, do stand affirmed and unaltered, so far as it declares the said deed of conveyance to the appellant from Robert Smart and George Smart to be void as to their creditors, the appellees.

But, as it seems to this court, that the credibility of the answers of the said defendants in the court of quarter sessions, is destroyed by the depositions which prove that they severally denied that the Smarts were indebted to the appellant, and that

the appellant suffered the Smarts to assert in his hearing, that they were not indebted to him, without contradicting them. And for this reason, that the appellant's account against them, the Smarts, which account amounts to one thousand two hundred pounds, and is stated by the appellant to be the consideration mentioned in the said deed of conveyance, cannot be sustained; neither does the court think that the appellant ought to be restrained only to so much of the account as has been admitted by the court of quarter sessions.

Wherefore, it is further decreed and ordered, that the decree of the said court, so far as respects the same be reversed, and that the cause be remanded to the said court, that it may appoint auditors to ascertain by legal proof, the amount of the several debts due from the said Robert Smart and George Smart, to the complainants in that court; and also the amount of the debts due to the said appellants from the said Smarts, and authorize the said auditors to demand, recover and receive all mortgages, and all debts due, or to become due, to the said Smarts, from Robert and Andrew Porter, and Robert Caldwell, in the said deed of conveyance specified. And from time to time (after retaining so much of the money for their trouble and expenses as shall be allowed them by the said court of quarter sessions), to make dividends thereof to the said appellees and the said appellant, or to their respective legal representatives, in proportion to the amount of their several debts to be ascertained, as aforesaid, until the whole of them are satisfied; provided, however, that the said appellant shall not receive a dividend until he shall give up to the said auditors the two clocks and watch mentioned in the said deed of conveyance, or the value of them, together with all and every other kind of property, real and personal, belonging to the said Smarts, or its value, which it shall be satisfactorily proven to the said auditors that appellant has received in consequence of the deed of conveyance aforesaid, and then the said auditors shall pay or deliver the residue, if any there be, to the said appellant, or his order. And the said court of quarter sessions shall, from time to time, make such further orders and decrees in the premises, in completion of this decree, as justice, and the contingencies which may arise in the case, may require. And it is further decreed and ordered, that each of the parties shall pay their own costs in this appeal, which is ordered to be certified to the said court.

See *Gruder v. Bowles*, *ante*, 665, for a decision on a like point.

CLARKE v. CALLOWAY.

[1 SWEED, 46.]

FERRY FRANCHISE—VESTING AND FORFEITURE.—The franchise of a ferry was granted to one, his heirs and assigns, so long as he and they should well and faithfully keep the ferry according to the directions of the grant. It was held that the right to the franchise did not vest until the grantee commences the keeping of the ferry; that the right to the franchise is forfeited by an unreasonable delay in putting the ferry in use; and that the forfeiture is not excused by the death of the first grantee soon after the grant and the disability of his heir, no exception having been made in the grant on account of such disability.

By Court. It appears from the facts agreed on by the parties that in October, 1779, the ferry in contest was established by act of assembly; and that the keeping thereof and the emoluments arising therefrom were granted to Richard Calloway, his heirs or assigns, so long as he or they should well and faithfully keep the same according to the directions of that act. And it further appears that the said Calloway, his heirs or assigns, never kept this ferry, nor manifested a disposition to do it, until about twelve years after the passage of the act; further than that, Calloway was killed by the Indians whilst he was constructing a boat for that purpose, but it does not appear what length of time had elapsed after he obtained this grant before he was killed. The defendant, Mrs. Patrick, however claims the ferry as heir at law to Calloway. And it further appears that she was an infant at the time of his decease; that before she came to the age of twenty-one years, she intermarried with the other defendant, Mr. Patrick; and that at the time the suit commenced she was and still continues under this coverture.

Whether the restriction contained in the grant which has been recited is a condition or a limitation, is a technical nicety, which may not be very material to the decision of the cause. But it seems clear that it cannot be a limitation, because such a condition is never styled a limitation, only where a third party will immediately be invested by the grant, with the right, whenever the first grantee shall fail to comply with the condition prescribed by the grantor. But no third party is named in the grant. Therefore, the restriction it contains must be a condition. This condition is evidently two-fold. In one point of view it is a condition precedent; for until the keeping the ferry commenced the right to it did not vest in the grantees, but remained in the grantor. In another point of view it is a

condition subsequent, by which the right to the ferry became forfeited whenever the keeping of it, as the act of assembly required, should cease. It need scarcely be observed that as the condition is double, so by the neglect of the grantees for the great length of time which has been mentioned a double forfeiture has ensued; and that it was not necessary, because it was impossible, for the commonwealth (the grantor) to make an actual entry on the premises to oust the grantees. But as it may be thought that Calloway's having begun to build a boat for the ferry was so far a compliance with the condition precedent that a forfeiture on that score could not take place until after a reasonable time for completing it had elapsed, the court will principally rely on the failure of the grantees for a length of time which does not admit of any apology. As to the death of Calloway, and his heir having been a minor during part of that period, and a *feme covert* for the remainder of it, no provision is contained in the grant for those events; nor has it been shown that those impediments have been regarded in any similar case, either by the legislature or courts of justice. Indeed, it also appears that the ferry in contest had, as soon as the circumstances of country would permit, been kept by other persons.

But this court cannot conceive that any of them were intruders in a way which can justify their being considered as the agents or trustees of the grantees, to support their right, because their right never originated, or to say the least, had become void by neglect, and not by disseisure, before those persons began to act, and because it is believed that no precedents in point are to be found. And with regard to those of them in particular to whom this ferry was granted by the county court of Madison, and from some of whom the plaintiffs derived their claim, it would be highly absurd that the defendants should found or support their right on the agency of those who acted under an adverse right. It is unnecessary to investigate the legality of the grant last mentioned until the defendants (who were the plaintiffs in the district court), make out a legal title, which the court is of opinion they have not done.

Wherefore, it is considered that the judgment of the said district court be reversed, and that the defendants in error pay unto the plaintiffs their costs in this court and the district court expended, which is ordered to be certified to the said court.

GULLION v. BOWLWARE.

[SUMED, 76.]

RIGHT OF TRIAL BY JURY.—A statute providing that upon the affirmance of a judgment in the court of appeals, judgment shall be given by that court against a surety on a supersedeas bond, is unconstitutional, in that it deprives the surety of a right of trial by jury in a case where it existed before the adoption of the constitution.

By Court. On considering the act of the general assembly of this state, entitled "An act to amend the laws of proceedings in civil cases," the court is of opinion that the clause in the said act which requires that when, on an appeal or writ of error, the judgment of an inferior court shall be affirmed in whole, or in part, by this court, that judgment shall be given by this court against the security for the due prosecution thereof, is clearly unconstitutional, inasmuch as thereby the right of trial by jury is taken away in such cases from the surety, which, prior to the date of the constitution, had long been enjoyed. Therefore, it is ordered that the decision of this court in the suits of Henry Gullion, plaintiff, against Esther and Mordecai Bowlware, as administratrix and administrator of Richard Bowlware, deceased, defendants, on a writ of error; John Chisim and John Emerson, plaintiffs, against The Commonwealth, defendant, on a writ of error; Absalom Watkins and Samuel Watkins, plaintiffs, against Chris. Clarke, defendant, on a writ of error, and Conradus Piles, plaintiff, against Samuel Shannon, defendant, upon a writ of error, entered on yesterday, the thirteenth of this instant, be amended by striking out all those parts of the said decisions which respect the sureties who are bound for the due prosecution of the said suits in this court, and that remedy against the said sureties may be had only in the same mode as was lawful before the passage of the said act.

DANIEL v. POGUE.

[SUMED 93.]

CONTRACT FOR SALE OF LAND VOID FOR FRAUD.—Where the vendor of a tract of land fraudulently misrepresents the location and quantity of the land, the contract of sale will be rescinded in equity.

REPRESENTATIONS AS TO QUANTITY OF LAND.—Where the vendor of a tract of land sold at a certain price per acre, represented it as containing a certain number of acres, when in fact it contained much more, the vendee cannot have set off to him the number of acres represented by the vendor to be in the tract, but the transaction will be altogether rescinded on equitable terms.

BILL in equity. The facts appear from the opinion.

By COURT. The appellants, who were complainants in the court below, have founded their equity on two points: 1. Fraud and deception practiced on them by the appellee in the sale of land they purchased from him; 2. That the appellee, contrary to equity, has obtained judgment at law for the balance of the price of the land, which remained unpaid, before he had extinguished other legal claims which interfere with several parts of it. This court conceives that the fraud and deception alleged are clearly proven, both as to the quantity of land and the situation of some of its lines and corners, which makes it unnecessary to investigate the second point. The principal object of the appellants appears to be to induce the court to sever the contract, or to cause the land to be so divided that they may not be compelled to keep and pay for more of it than they were induced by the appellee to believe the whole of it would measure. But as neither the contract nor the land consists of several distinct parts, no general principle can be devised which would authorize such a severance, and to keep all the land, and only pay for a part of it is not requested by the appellants, nor would it be authorized by equity. Therefore, it seems that the most effectual relief within the power of the court is altogether to dissolve the contract, and subject each of the parties to such reasonable conditions as the circumstances of the case require.

Wherefore, it is decreed and ordered that the said decree of the district court be reversed, it being repugnant to the foregoing opinion, and that the said contract, as more fully set forth in the appellant's bill, and the articles of agreement therein referred to and made part of the same, be dissolved; that the appellee do pay unto the appellants their costs expended in the prosecution of this suit in this court, and in the said district court—also their costs expended in defending the appellee's suit at law for the recovery of the money accruing on the contract—and that the injunction to stay all further proceedings thereon, so far as it is now in force, be perpetual.

And it is further decreed and ordered, that the appellants, or their heirs, deliver to the appellee, his heirs or assigns, possession of the said land on or before the twenty-fifth day of December, which shall be in the year one thousand eight hundred and two, and that the appellee repay, or cause to be repaid, to the appellants, on or before the twenty-fifth day of June next, the several sums of money which they have advanced to him in part of the price for the said land, with interest thereon at the

rate of six per centum per annum on each sum, from the time it was paid until it shall be repaid; provided, however, that if the appellee fails to repay, or cause to be repaid, the said several sums of money, with interest therefore as aforesaid, on or before the twenty-fifth day of June next, then the appellants shall not be compelled to yield possession of the land until the expiration of six calendar months from the time the repayment shall be made, nor at any time until they, or their legal representatives, are paid the full value of the crop, which may then be growing on the land; provided, also, that should the said several sums of money and interest as aforesaid not be paid or tendered on or before the twenty-fifth day of June, which shall be in the year one thousand eight hundred and three, the said appellee, or his heirs, shall then make, or cause to be made, to the said appellants, their heirs, or assigns, a good and sufficient deed in fee-simple, with general warranty, for the whole of the said land, upon their completing payment therefor, to him or them, for four hundred and thirty pounds, lawful money of the state of Kentucky. And it is further decreed and ordered, that this suit be remanded to the said district court, that, at the costs of the appellee, it may forthwith cause valuations to be made, as the law directs, of the rents which ought to be allowed by the complainants for the said land, from the time they took possession thereof under the said contract until the said twenty-fifth day of December, one thousand eight hundred and two, and of all unnecessary waste and destruction of timber by them or their orders, committed thereon since the commencement of that period; and, likewise, that it cause to be valued all lasting improvements, by clearing ground, erecting houses, or otherwise, and enter the return of both on its record, and at the same time enjoin the appellants from thereafter committing any unnecessary waste or destruction on the said land; after which no further valuation shall be made, except of such waste or destruction, and of the crop growing on the land as aforesaid. And it is further decreed and ordered, that if the difference between the amount of the said valuations shall be in favor of the rents, waste and destruction before mentioned, the appellee shall retain the balance out of the said repayment to be made by him; and if the difference between the amount of the said valuations shall be in favor of the before-mentioned improvements, it shall be paid to the appellants at the time herein prescribed for the repayment of the moneys which by them have been paid in part of the price of the land and

the interest therefor, and shall be considered as an addition to their amount, be subject to the same provisions, and carry interest as aforesaid from the last mentioned time. And, finally, it is decreed and ordered, that this suit shall be kept open until the purposes of this decree are accomplished; and the said district court shall make such further decrees and orders therein, as contingencies may make requisite, which is ordered to be certified to the said court.

See *Bostwick v. Lewis*, ante, 80, and note.

BIBB v. PRATHER.

[SHEPHERD, 126.]

MISREPRESENTATION AS TO BOUNDARIES.—Where the vendor of land misrepresents the location of its boundaries to the vendee at the time of the sale, the sale will be set aside in equity, notwithstanding the representation was innocently made.

RELIEF WHEN TITLE DEFECTIVE.—Where the title of the land sold is defective, equity will, at any time before the conveyance, enjoin the collection of the purchase money, and set aside the sale on equitable terms.

THE facts appear from the opinion.

By COURT. It will be necessary only to examine whether the district court erred in dissolving the injunction upon the merits of the cause. From the bill, answers and exhibits, it appears that Morehead misrepresented the boundary of the land, in consequence of which a larger proportion of broken, stony, poor land, not so well timbered and inferior in value, has been included, than if the line had run as represented by him; that, to a moiety of the land conveyed by Crist, he had no legal title and that there is an interference of the two tracks of land with each other. It is contended that the misrepresentation was not made with a fraudulent intention; that the defects in the title were not known till some time after the contract, and that the interference is of a very small quantity. But admitting all this, yet the injury to the complainant is the same as if the misrepresentation had been made with a fraudulent intention and the defects in the title had been known at the time of the contract and concealed. In the one case, the fraud would have been criminal; in the other, it is a legal fraud, and in either case a court of equity ought to afford relief. It is further con-

tended that the defendants, Prather and Smiley, have been deprived of the securities which they held for the title of these lands, by the act of the complainant, and being innocent assignees of the bonds, and guilty of no fraud, ought not to be affected by any fraud or misrepresentation practiced or made by the defendant, Morehead.

The act of assembly concerning the assignment of bonds and other writings, passed in 1796, subjects the assignee to all the equity to which the original obligee was subject, but in this case the assignees were privies to the original contract, and on either ground must stand in the situation of the obligee. As to their being deprived of the securities which they held for the title of these lands, there is nothing in the objection. A court of equity can place them in as good a situation as that in which they stood with regard to these securities. The defendants' counsel also contended that the complainant has not shown the quantity or value of the land, the situation of which has been misrepresented, or the amount he is likely to suffer on account of the defective title; in answer to which it may be said that from an exhibit in the cause it does appear that there is about one hundred acres, which includes land inferior in value, broken, stony and badly timbered, and from another exhibit it also appears that to nearly one-half of the land conveyed by Crist the title is defective; but upon a motion for the dissolution of an injunction, where the notice is generally short, and in a case embracing so many different points as this does, it is not to be expected that the party should come as fully prepared with proofs as he might do on the final hearing of the cause; it was sufficient for him to show that there had been misrepresentation as to the subject-matter of the contract as to one point, and defect of title as to another; how far he was injured by the one, and what was the extent of the other ought to have remained to have been decided at the final hearing of the cause. The court is, therefore, of opinion, that the district court erred in dissolving the injunction; that the decree must be reversed, with costs, and the suit remanded to the said district court, with directions to reinstate the injunction, and retain the same till the final hearing of the cause, which is ordered to be certified to the said court.

CHAMBERS v. WINN.

[REPEATED, 100.]

DUTY OF ONE BOUND TO DELIVER PROPERTY.—Where an obligation is payable in property on demand, and the obligor has a known place of residence at the time the contract is made, the obligee must, as a general rule, make demand at the residence of the obligor, before he can maintain an action; but there are exceptions to this rule arising from special contract, from the debtor not having a known place of residence in the state at the time of the contract, from a subsequent change of residence, or from other special circumstances or considerations.

This suit is founded on an obligation for the payment on demand of one hundred and twenty dollars in property. And the first error assigned is, the declaration does not state that the property was demanded at the defendant's usual place of residence. It is an established doctrine (unless otherwise specially stipulated), that whenever payment is to be made in money, it ought to be made or tendered by the debtor to the creditor or his agent, if they can be found, in the realm or country where the debt was contracted. One reason of which, among others, must be that money is easily carried from one part of a country to another. But the transportation of almost every other kind of commodity is much more expensive and difficult, so that in general it would be highly inconvenient, both to the debtor and creditor, that the same doctrine should be extended to such contracts, inasmuch as the cost of transportation to one or both the parties would, in many instances, exceed the value of the commodity, and in many instances be otherwise very oppressive to the one or the other of them. Neither can the court find that this doctrine concerning money contracts has been extended by other courts to contracts for commodities, nor that the question has been generally decided on in any way. Therefore, it seems just and proper in this cause, and in the generality of other cases of the kind, that whenever the debtor had a known place of residence within the state where the contract was entered into, that application must there be made for the commodity, and demanded of him, or his agent, if to be found at that place, which is consonant to the decision of the court of appeals for Virginia, in the case of *Dandridge v. Harris*, 1 Wash. 328 [1 Am. Dec. 465]. To this general rule, like almost all others, there will be many exceptions, arising from special contract, from the debtor not having a known place of residence in the state at the time of the contract, from afterward changing his place of resi-

dence, or from other special circumstances or considerations which will vary the equity of the rule. For example, when a contract is for such commodities as by law are subject to be inspected at a public warehouse, it may be implied that they are to be received by the purchaser at some warehouse where he usually receives them; or when the contract is for commodities to be consumed by the purchaser in a town, or to be exported from thence as merchandise, it may be implied that they are to be delivered there, if from the general custom of the place it ought to be expected. And it may be necessary to add that when any of them are relied on in a suit, they ought to be set forth in the declaration, replication, or assignment of breaches.

The other errors assigned in this cause also seem material, which, however, need not be particularized, more especially as errors of the same kind have heretofore been adjudged fatal by this court. Therefore, it is considered by the court that the judgment aforesaid be reversed and set aside; that the cause be remanded to the court from whence it came, for new proceedings to be had therein to recommence by amending the declaration, and that the plaintiff recover of the defendant his costs by him in this behalf expended; which is ordered to be certified to the said court.

SMITH v. DURRETT.

[SIXTH, 233.]

INDIVIDUAL LIABILITY OF PARTNER.—If credit be given exclusively to one partner, and it appears that it was not intended that the other should be held or looked to for payment, the latter cannot be made liable.

RELIEF IN EQUITY.—A court of equity will not aid a party to set up a legal defense which he could have made, and which he has omitted to make at the proper time in an action at law.

By Court. Smith having commenced a suit at law for goods, wares and merchandise, sold and delivered to Durrett, obtained a judgment thereon for thirty-seven pounds fourteen shillings and one penny, to be relieved from the payment of which Durrett brings a suit in equity, and obtains an injunction to stay the proceedings on the said judgment, suggesting that a partnership existed between Smith and Thomas Sloo, and that the goods were delivered on the credit of Sloo; this injunction was made perpetual by the inferior court. The counsel for Smith contended that a partnership between Smith and Sloo is not

directly charged in the bill or relied on; that if a partnership did exist, it was only in a special and particular way, and not understood by the parties to have the effect to make each liable for the contracts of the other; that the purchase of the wheat and cordage made by Sloo of Durrett, was in his individual character, and not as a partner of Smith; that the goods were delivered to Durrett on his own credit, and not on Sloo's.

The counsel for the appellee contended that a partnership did exist between Smith and Sloo, and although it was for a particular purpose, yet that the wheat purchased by Sloo of Durrett was embraced in the partnership; that the agreement was understood in different ways by Sloo and Smith; that Sloo's understanding of the agreement comported with the writing, and, therefore, was the more correct, and that the goods were delivered on the credit of Sloo.

As to the partnership, it is not directly charged in the bill, nor is it so sufficiently stated and proved as to justify the inferior court in affording the relief which they have extended to the appellee; if any partnership existed from the proofs in the cause, it is evident that the parties did not intend to make each liable for the contracts of the other; this was clearly Smith's understanding of the agreement, and from different parts of Sloo's conduct, it appears that he was once of that opinion, which probably was changed with his circumstances. It also appears from Durrett's own showing, in his bill, that he made the sale of the wheat and cordage to Sloo, on his individual credit, and held him personally liable for the amount; nor does Durrett show or state, even admitting the partnership, that anything is due to him from the partnership. The second point relied on, that the goods were delivered on the credit of Sloo, seems to be at variance with the first; but waiving that, it appears that the sale of the wheat and cordage made by Durrett to Sloo, was in December, 1798; that previous to this time, Durrett had received goods to the amount of eleven pounds fifteen shillings and seven pence, expressly on his own credit, as Sloo was not his debtor until that contract took place, at least the record affords no evidence that he was. After this period it seems to be admitted, that Smith would have delivered goods to Durrett upon Sloo's credit, provided he had produced an order, and it appears from the bill, that Durrett was informed by Smith's agent, that an order from Sloo was necessary; that he still continued to take up goods without such order the exhibits also prove; that Durrett knew that he stood charged on

Smith's books for the goods, and it does not appear that any such order was produced, and, therefore, this court conceives that Durrett obtained the goods on his own credit; and this opinion is fortified by the decision of the constitutional tribunal to ascertain the fact, for it appears that this question was litigated before the jury on the trial at law, and their verdict accords with the opinion of this court; and if it was not litigated before the jury, Durrett might and ought then to have defended himself on this ground. Having defended himself, and failing or neglecting to make this defense, a court of chancery ought not now to interfere to relieve him.

Wherefore it is considered by the court that the decree aforesaid be reversed, with costs; that the cause be remanded to the Mason circuit, with directions to dissolve the injunction and dismiss the bill with costs, which is ordered to be certified to the said court.

See the case of *Le Guen v. Gouverneur*, 1 Am. Dec. 121, for a similar point in regard to the relief in equity.

MEAUX v. HELM.

[SNEED, 252.]

SPECIFIC PERFORMANCE FOR SALE OF LAND.—A court of equity will not enforce the specific performance of a contract for a conveyance of land, which has been brought about by fraud or mistake, or which has been attended with hardship occasioned by the delay of the complainant in performing his part of the contract.

SAME.—Where a party bought a tract of land, and agreed to pay for it in forty days, in continental currency, which he knew was depreciating rapidly, and would soon become worthless, of which depreciation the vendor was not fully informed, and the vendee delayed payment for a number of years, and until the currency became worthless, it was held, that a court of equity should not decree a conveyance of the land at the instance of the vendee or his assignee.

SAME—RELIEF IN EQUITY.—Where the vendor, in a contract for the conveyance of real estate, died, and a bill was brought against his heirs for a specific performance, the fact of the vendor's executor having obtained a judgment for the purchase-money will not be considered such a confirmation as will bind the heirs to a specific performance of a hard and unconscionable bargain; and the contract and judgment should be set aside upon equitable terms.

By Court. The suit was instituted by Richard Meaux, to obtain deeds of conveyance for a settlement and pre-emption for fourteen hundred acres of land on Jessamine creek, in Jes-

samine county, which, on the sixth day of August, 1781, were sold by Leonard Helm, the ancestor of the defendants, to Thomas Quirk, of whom Meaux is the assignee, for thirty-five thousand pounds of the then current money of Virginia, payable on or before the fifteenth day of the September following.

It is the peculiar province of courts of chancery to compel the specific performance of contracts; and this they will do after the time agreed upon by the parties for execution has elapsed; and without an inquiry into the equality of the considerations. There are, however, several exceptions to this general rule. For example, where a contract on the part of complainant was fraudulent in its origin, and was entered into by the other party by mistake produced by the fraud; or when it has afterward been attended with some peculiar hardship, occasioned by a delinquency on the part of complainant, for which an adequate compensation cannot be devised. On either of these circumstances appearing in evidence, the court will dissolve the contract, if the parties can be left or be put in the same condition they were before the contract was made. It is urged that both these defects are apparent in the contract now under investigation, and that by a dissolution thereof both parties will be left, or can be put in *statu quo*.

As to the first of these points, it is proved that this contract was entered into at the falls of the Ohio river, at a time when the sudden or rapid depreciation of the then paper currency was not generally known, or expected in this country; and that Quirk had shortly before returned from Virginia, and probably was well acquainted therewith. Indeed, Quirk's knowledge of the rapidity of the depreciation in the eastern parts of the United States is rendered certain by his declarations, just before the contract was concluded; that in a short time the proposed price of the fourteen hundred acres of land would not buy a sow and pigs. On the reverse it is proved to be very improbable that Helm knew that this currency was depreciating much faster in other parts of the Union than in Kentucky. And Helm's ignorance of the fact may be inferred from his having sold a settlement and pre-emption of fourteen hundred acres, lying in the midst of the rich lands of this country, for a sum which, by the scale of depreciation, only amounts to seventy pounds specie. It may notwithstanding be doubtful whether fraud on the one part, and mistake produced thereby on the other, are so fully proved as to authorize an absolute dissolution of the contract. But the court could not hesitate,

on the proof which has been produced, to refuse decreeing conveyances for the land, until its specie value, at the time the contract originated, should be ascertained, and paid, with legal interest thereon. And on this footing, the court will place the parties, did it not appear that after the contract was made, it has been attended with several peculiar hardships to Helm and his heirs, occasioned by the delinquencies of complainant and Quirk, his assignor, which, considered in conjunction with the evidence already recited, seemed to render it still more proper to decree an unconditional dissolution; provided the parties can be placed in the situation they would have been, had the contract never existed.

1. It does not appear the price of the land was paid, or tendered on or before the day it became due. A default of this kind, as has been observed, is not commonly regarded by courts of chancery. The reason is, that where payment was to have been made in specie, which is of universal use and permanent value, the loss occasioned by the delay can be compensated by legal interest. But it is easy to conceive that a delay of payment in paper currency must almost in every instance subject the creditor to inconveniences, for which an adequate compensation cannot be ascertained; and this was remarkably the case as to the paper currency now in question. Indeed, in this country, where money cannot be borrowed for legal interest with the same facility as in England, justice requires that our courts of chancery should in the same degree be less disposed than the court of chancery in that country to decree the execution of contracts, when it appears probable that a delay in the payment of the consideration, even in specie, had occasioned a peculiar hardship to the other party. And as in this contract payment was promised to be made within forty days from its date, it ought to be presumed that Helm then contemplated to accomplish some special purpose with the money, from which he was prevented by the failure of Quirk.

2. But further, the payment was not made before paper money ceased to be a legal tender, nor whilst an advantageous purchase of land warrants might have been made therewith, which about that time was generally considered as an object of singular importance; and either to pay debts or to purchase such warrants must have been Helm's object in contracting for so large a quantity of that currency.

3. Moreover, it does not appear that prior to the institution of this suit, which was twelve years after paper money ceased to

be a currency, the sum in specie was tendered, which the legislature had pointed out as an equivalent. And during this period Helm died, and the land descended to his heir, who probably was uninformed of equitable circumstances in his favor, which Helm could have pointedly proved; this it was conceived ought to be considered as another peculiar hardship occasioned by the delay of Quirk.

4. But had the contract been *bona fide* on the part of Quirk, and not attended on the part of Helm and his heirs with the hardships which have been stated, to be left in suspense for such an unreasonable length of time, whether Quirk would ever be able or willing to pay for the land, was certainly a peculiar hardship of great magnitude. It indeed appears by the exhibits that a suit at law had been instituted against Quirk by Helm's executor, for the price of the land, and that in November, 1786, a judgment by confession was obtained for forty-four pounds, nine shillings, eight pence, including interest to the fifteenth day of that month; whereas, by the scale of depreciation, the debt and interest then amounted to about double that sum. This judgment, however, does not appear to be yet discharged; but if it had, and there was no presumption that the confession thereof was made by mistake or collusion, still, it would not have been a confirmation of the contract on the part of the heirs of Helm, as it does not appear that they were privy to the suit or confession; on their part equity could only require that the amount of the judgment, with legal interest, should be refunded to Quirk, or his representatives.

On an attentive view of the several circumstances which have accompanied this contract, it seems to the court that at the time the present suit was instituted, the heirs of Helm were not under any obligation, in law or conscience, to have made the conveyance for the land to Quirk, or his assignee, or that the heirs of Helm can now be placed in the situation which will produce the obligation.

Wherefore it is decreed and ordered, that the said decree of the district court, so far as it extends, be affirmed; and it is further decreed and ordered, that the said contract be dissolved; that the said judgment at law obtained by the executor of Leonard Helm, deceased, against Thomas Quirk, be void and of no effect; and that each party do pay their own costs, occasioned by this appeal, which is ordered to be certified to the circuit court of Fayette county.

GIMBLIN v. HARRISON.

[SHARP, 315.]

MISREPRESENTATION IN SALE OF LAND.—Where a party purchased land of another, which neither of them had ever seen, the purchaser taking the representations of a third party as to its quality and location, the maxim *caveat emptor* applies, and having taken no covenant of warranty as to the quality or location of the land, the purchaser is without remedy, if the quality or location be not such as represented.

By Court. The material question in this cause is, did the appellee make such misrepresentation of the quality or situation of the land sold by him to the appellant, as ought to avoid the sale.

The appellant states in his bill, that the appellee positively stated and assured him, that it was good second-rate land, and that he was induced to sell it as such, from the information given him by Richard Barbour, on which statement and assurance, he, the appellee, relied. He further states, that the land does not lie at the place described, nor is it of the quality represented, and not worth twenty dollars. The appellee, in his answer, states that he sold and conveyed the land agreeable to the calls of the patent, and that it lies agreeable to contract, and where it is said to lie in the patent, and denies that he was guilty of any deception or misrepresentation as to the quality; that he informed the appellant that he had never seen the land, but that he heard Richard Barbour say it was second-rate land; he denies that he warranted the land to be second-rate, or gave any other assurance than as aforesaid, from information which he believed to be true; as the land was entered with the commissioners of the tax as second-rate land in the lifetime of the said Richard Barbour, by him, and paid for as such.

It is proved that the appellee informed the appellant that the land was located by Richard Barbour; that he, the appellee, was unacquainted with the quality of it, but had been informed by Barbour that it was second-rate land. It is further proved that the appellant said he had purchased the land on the representations of Richard Barbour, who was a man who could be depended on, and who had located the land; that he did not purchase on the word of the appellee, for he had never seen it. From these allegations and proofs, it is evident that there was no misrepresentation as to the quality of the land. But the situation thereof is different from that described in the certificate of survey and deed; these represent it as being fifty poles

below the mouth of Deserter's Fork; the survey returned in the cause shows it to be fifty poles above the mouth of the said fork. This makes a difference of one hundred poles, and the quality of the land lying between appears to be second-rate, and the other land of a very inferior quality.

As neither the appellant nor the appellee had seen the land before the purchase made, and the appellant trusted to the representation of a third person, and omitted to examine into the quality and situation of the land, which were objects on which he might have exercised his observation and judgment, and protected himself from surprise and imposition, the maxim *caveat emptor* ought to apply, and to provide against this rule, he should have required an express warranty; but having neglected both, however hard his situation may be, he must submit to it.

Wherefore, it is considered by the court that the decree aforesaid be affirmed; that the appellee may proceed to have the benefit of the same in the court below, and recover of the appellant his costs in this behalf expended; which is ordered to be certified to the said circuit court of Mercer county.

See *Beckwith v. Lewis*, ante, 72, and note, for a discussion of this subject.

WHITTLEGE v. WATT.

[SHEPP, 335.]

ALLOWANCE FOR IMPROVEMENTS BY OCCUPANT OF LAND.—A *bona fide* occupant of land, believing himself the owner, is entitled to be paid the enhanced value of the land, by reason of his improvements made after, as well as before, the commencement of an action by which he was evicted, and he is liable for rents and profits from the time that he had notice of the adverse claim.

By Court. This suit, having been commenced previous to the passage of the act entitled "An act concerning occupying claimants of lands," cannot be affected by any of the provisions thereof, but must be decided by the principles and rules of equity applicable to the case. It is conceived that the inferior court have erred in the application of the rules and principles of equity, and departed from the practice of courts of chancery in decreeing that so much of the value of improvements as is charged since the commencement of the suit ought not to be

allowed. The principle that "no person ought to profit by another's loss" is peculiarly applicable to this case, where the possessor of a subject, which he *bona fide* considers to be his own, bestows his money and labor on reparations and ameliorations; the proprietor claims the subject and prevails; he profits by the meliorations, and the money and labor bestowed thereon are converted to his use. Equity requires that the *bona fide* possessor should be reimbursed. And it is conceived that all who have obtained grants for land from the commonwealth, and those claiming under them, are to be considered as *bona fide* possessors. Lord Kames, in his Principles of Equity, page 106, states that "the titles of landed property, being intricate and often uncertain, instances are frequent where a man in possession of land the property of another is led by unavoidable error to consider it as belonging to himself; his money is bestowed without hesitation on repairing and meliorating the subject. Equity will not permit the owner to profit by such mistake, and in effect to pocket the money of the innocent possessor; he will be compelled by a court of equity to make up the loss, as far as he is richer."

If this doctrine be correct in Europe, where, from the early and long settlement of the country, the rules of decision being well established and fixed by their courts, and a variety of other reasons, the titles of landed property can, with much more certainty, be ascertained than in this country, which was lately a wilderness, and where the law under which titles to land are derived was merely made, the decisions of the courts on cases arising thereon unknown, and, of course, uncertain, no doubt can be entertained of its propriety and application to land cases here. Even was the doctrine in Europe different from what it is stated to be, it might well be doubted whether from difference in situation and circumstance, a different rule should not prevail here. In England, where property is well ascertained by the decisions of their courts, if a man enter into articles for the purchase of lands, gets possession, and under expectation of having the articles carried into effect, improves the land, even if the articles were obtained by him unfairly, to such a degree as that a court of equity would not decree a specific performance of them; yet the possessor was allowed for all valuable improvements, and to account for the rents: 1 Vern. 487; Talbot's Cases in Equity, 236; 3 Eq. Ca. Ab. 681. The practice adopted in the late supreme court for the district of

Kentucky, and recognized and approved by the court of appeals in Virginia, was to appoint commissioners to ascertain the rents and profits from the time notice was given of the adverse claim, and to allow for all lasting and valuable improvements: *Consilla v. Briscoe*; *Swearingen v. Briscoe*. From these authorities there can be little hesitation in declaring that a *bona fide* possessor is entitled to an allowance for all necessary, lasting, and valuable improvements made on the premises to the time of eviction.

Cases may arise which may be exceptions to this general rule without impeaching it, as where unnecessary, expensive, useless, fanciful, or ornamental improvements should be made or done with a design to render it out of the power of the proprietor to pay for them, and, therefore, to abandon his claim to the land.

Such instances will be rare, and few men found who have so much money as to expend it in this way. Therefore, it is considered by the court, that the said decree of the Bourbon circuit court, so far as it is variant from this opinion, be reversed and set aside. And this court proceeding to make such decree as the said circuit court should have pronounced, it is decreed and ordered that the defendant in the court below do, by a good and sufficient deed, at the costs of the complainant, convey to him in fee-simple, all his, the defendant's, right, title and interest in and to the lands decreed by the said circuit court to the complainant, with warranty against him, the defendant, and all claiming under him, and on or before the twenty-fifth day of December next, yield and deliver possession of the said land to the complainant. And it is further decreed and ordered, that the complainant pay or tender to the defendant, on or before the day aforesaid, the sum of two hundred and sixty-nine pounds one shilling and six pence, deducting therefrom such sum as may be found due for rents since the third day of March, 1802, up to the said twenty-fifth day of December next; also, such further sum as may be found due for all unnecessary waste and destruction of timber, soil, or otherwise, suffered, done, or permitted, on the said premises by the said defendant, or those claiming under him during the last mentioned period, to be ascertained by commissioners, whom the said court are directed to appoint for the purposes aforesaid. And also such further sum as the costs of suit will amount to, which were decreed to the complainant by the said court.

And it is further decreed and ordered, that the plaintiff recover of the defendant the costs of prosecuting this writ of error, which is ordered to be certified to the said circuit court.

Under statutory enactments in various states, provisions are made for an allowance for improvements made by an occupant of land, under a *bona fide* claim of title, who has been ejected by reason of a defect of title. However, independently of these provisions, it was a well established ground of equity relief, that an allowance should be made for such improvements; and it will be observed that it was on this equitable principle that the decision in the principal case was founded. For a long time equity has interposed in favor of a defendant in this situation. Story, 1 Eq. Jur., sec. 388, says: "If a man, supposing he has an absolute title to an estate, should build upon the land with the knowledge of the real owner, who should stand by and suffer the erections to proceed, without giving any notice of his own claim, he would not be permitted to avail himself of such improvements, without paying a full compensation therefor; for in conscience he was bound to disclose the defect of title to the builder." Again it is stated: "The cases, however, which we have been thus far considering, are cases where the party sought relief in equity as a plaintiff, and not where compensation was ordinarily sought by the defendant in resistance or modification of the plaintiff's claim. In these latter cases the maxim often prevails, that he who seeks equity shall do equity. Thus, for example, if a plaintiff in equity seeks the aid of the court to enforce his title against an innocent person, who has made improvements on lands, supposing himself to be the absolute owner, that aid will be given to him only upon the terms that he shall make due compensation to such innocent person to the extent of the benefits which will be received from these improvements:" 2 Eq. Jur., sec. 769 a.

In two well considered cases in this country, which may in fact be called leading cases, this general subject is discussed. These are the cases of *Putnam v. Ritchie*, 6 Paige, 390, and *Bright v. Boyd*, 1 Story, 478. In the former, Chancellor Walworth laid it down, that the rule of the civil law in regard to industrial accessions to the property of another, made in good faith by *bona fide* possessor, has not been adopted in England or in that state, except so far as to allow him to set-off or recoup in damages the value of such industrial accessions, against the owner's claim for rents or profits during the time of possession; but where the accessions have been made in good faith by a person who has the legal title, so that the real owner is compelled to resort to a court of equity to establish his equitable title, the court will act upon the rule of the civil law of natural equity, and compel the complainant to compensate the adverse party for such improvements as a condition of granting the equitable relief. The learned Chancellor, in this case, ably examined the authorities. In the course of the decision, he says: "I have not, however, been able to find any case, either in this country or in England, wherein the court of chancery has assumed jurisdiction to give relief to a complainant, who has made improvements upon land, the legal title to which was in the defendant, where there has been neither fraud nor acquiescence on the part of the latter after he had knowledge of his legal rights."

In *Bright v. Boyd*, Story, J., in a most learned decision, examined this question. It was there held that where the owner of an estate, after a re-

covery thereof at law from a *bona fide* possessor for a valuable consideration, without notice, seeks an account in equity, as plaintiff against such possessor, for the rent and profits, courts of equity will allow him to make a deduction therefrom of all the meliorations and improvements made beneficially by him on the estate, and thus to recoup them from the rents and profits, and the same doctrine holds in cases where the owner of an estate has only an equitable title thereto. This case was cited and approved in *Kanawha Coal Co. v. Ohio Coal Co.*, 7 Blatch. 422; in *Stark v. Starr*, 1 Sawyer, 27, 30; and in *Williams v. Gibbs*, 20 How. 538.

See further in relation to the doctrine of the principal case: *Ford v. Holton*, 5 Cal. 319; *Bond v. Hill*, 37 Tex. 626; *Sale v. Crutcher*, 8 Bush. 688; and see the case of *Dikworth v. Sinderling*, *ante*, 469, where it is held that equity will not relieve against a party in possession under a defective title, unless an allowance be made for improvements.

DICKERSON v. NABB.

[Summed, 230.]

ACCOUNT, DEFENSE AGAINST.—If a party has acknowledged the correctness of an account presented against him by another, he is not, however, estopped, showing that the acknowledgment was founded on a mistake, and that the account is not correct.

By Court. The plaintiff from the covenant was entitled to two years' rent for the houses and lot; the defendant had a right, by way of set-off, to a credit for certain improvements and repairs, to ascertain which the defendant proves a parol contract made with the plaintiff, in which he acknowledged that he had been furnished with an account of the improvement and repairs, and by which they exceeded the rent about seventeen pounds. The plaintiff then offered proof as to the improvements and repairs which had actually been made, the real value thereof, and the prices which they cost, in order to prove that the acknowledgment made was founded on a mistake. This was certainly legal and proper testimony, for, if an account of the improvements and repairs had been adjusted and signed by the parties, either would have had a right, upon discovering an error, to have it rectified; for instance, if in the account a charge had been omitted for any improvement or repair, or in the price thereof, the plaintiff would be bound to account for it, *e converso*; if a charge is inserted for an improvement or repair which was not made, or the price thereof had been erroneously extended in the account, surely by the same rule the plaintiff ought not to be bound for its amount.

The inferior court, therefore, erred in rejecting the testimony offered by the plaintiff.

Therefore it is considered by the court that the judgment aforesaid be reversed, annulled, and set aside; that the cause be remanded to the Jefferson circuit court, with directions to admit the said testimony, the weight of which to be left with the jury, and that the plaintiff recover of the defendant his costs in this behalf expended, which is ordered to be certified to the said court

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ACCOUNT, DEFENSE AGAINST.—If a party has acknowledged the correctness of an account presented against him by another, he is not, however, estopped, showing that the acknowledgment was founded on a mistake, and that the account is not correct. *Dickerson v. Nabb*, 725.

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2. **DEFECTIVE ACKNOWLEDGMENT.**—A conveyance of land acknowledged by the grantor and his wife, before two justices of the peace, in a county in which they did not reside, and in which the land was not situated, is not admissible in evidence; but parol evidence may be received to prove that a grantor, although stated in the deed to reside in a particular county, was a resident of the county in which the deed was acknowledged. *Gittings v. Hall*, 502.

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CONTRACTS.

1. **CONTRACT TO CONVEY LAND WITH WARRANTY.**—A contract by three to convey land with warranty is not complied with by a conveyance with warranty by one of the three warrantors, and a release or quitclaim deed from the other two. *Lawrence v. Parker*, 10.
2. **JOINT AND SEVERAL OBLIGATION.**—The obligatory part of a bond was in these words: "We are holden and bound unto M. C. in the sum of five hundred dollars, for the payment of which we bind ourselves and each of us." This was held a joint and several bond, on which an action could be brought against one of the obligors separately. *Carter v. Carter*, 113.
3. **CONTRACT VOID AS AGAINST PUBLIC POLICY.**—The land of A. was advertised for sale, on an execution in favor of B. & C., who had purchased the land subsequent to the judgment, without knowledge of such judgment, agreed with B. at the sale that if he would not bid against him, he would pay him the amount of his execution, and give him his note for the further sum of one hundred and fifty dollars, and B. agreed to these terms, and did not bid at the sale. In an action on the note against C. by the second indorsee, to whom it was transferred after maturity, and with a knowledge of the circumstances under which it was given, it was held that the consideration of the note might be inquired into, and the consideration being in this case unconscionable, and against public policy, the note was void. *Jones v. Caswell*, 134.
4. **CONTRACT VOID AS AGAINST PUBLIC POLICY.**—A penalty inflicted by statute upon the commission of an act, implies a prohibition of it as an offense, so as to make a contract based on such act void; therefore under an act affixing a penalty for acquiring titles to lands in Pennsylvania, except in the mode specified, a contract for the purchase and sale of lands in Pennsylvania, under a Connecticut title, such being excluded by the act, is unlawful and void, and no action can be maintained on such contract. *Mitchell v. Smith*, 417.
5. **CONTRACT VOID FOR WANT OF CONSIDERATION.**—If an attorney promise his client, while the action is pending, to indemnify him against the consequences of it, the promise is without consideration, and an action cannot be maintained thereon. *Mitchell v. Bell*, 627.

See DEMAND, 1.

COSTS.

See DAMAGES, 5.

COVENANTS.

1. **WHEN ACTION ARISES ON COVENANT OF WARRANTY.**—An action on the covenant of warranty in a deed cannot be maintained without showing an eviction by an elder and better title. *Emerson v. Proprietors*, 34.
2. **COVENANT OF TITLE IN CONVEYANCE.**—The words "grant, bargain,

sell, alien, and confirm," in a conveyance in fee do not imply a covenant of title; but it is implied by the word "*dedi*" or "gave." *Frost v. Raymond*, 228.

3. COVENANT RUNNING WITH LAND.—A covenant of seisin does not run with the land. *Lot v. Thomas*, 354.
4. ACTION ON COVENANT OF SEISIN.—To maintain an action on the covenant of seisin it is not necessary to prove an eviction or an offer to restore the possession. *Id.*
5. SAME—ESTOPPEL.—In this action the plaintiff is not estopped by his own mortgage of the land subsequent to the covenant, or a sale by the sheriff, to say that the defendant, the covenantor, had no title. *Id.*

See DAMAGES, 4; DEEDS, 8; LEASE, 1.

CRIMINAL LAW.

1. DESCRIPTION OF FORGED INSTRUMENT.—In an indictment for forgery, alleging an instrument to be "in the words and figures following," a strict recital is necessary; but the number of a bank bill and the marginal figures indicating its amount, not being parts of the bill, need not be set out in the indictment. *Commonwealth v. Bailey*, 3.
2. DISCHARGE OF JURY IN CRIMINAL CASE.—Where the defendant has been put on his trial and the jury are unable to agree upon a verdict, the court can, in its discretion, even against the consent of the defendant, discharge the jury; and this will not be a bar to a trial before another jury for the same offense. *State v. Woodruff*, 122.
3. DISCHARGE OF JURY WITHOUT PRISONER'S CONSENT.—After a prisoner has pleaded to an indictment, and the jury have been sworn, and evidence offered, if the prosecution, without the prisoner's consent, withdraw a juror merely because they are unprepared with evidence, the prisoner cannot afterward be tried on the same indictment, and if tried, it is a good cause for arrest of judgment. *People v. Barrett*, 239.
4. INDICTMENT FOR PERJURY—STATING HOW SWORN.—An indictment for perjury, which avers that the defendant did "then and there, in due form of law, take his corporal oath," without stating that he was sworn on the gospels, or by uplifted hand, is sufficiently certain. *Republica v. Newell*, 381.
5. SAME—CHARGE, HOW STATED.—An indictment for perjury at common law, which states that the defendant "did, voluntarily and of his own free will and accord, propose to purge himself upon oath of the said contempt," negating, by express averments, the truth of the oath, and concluding that the defendant "did knowingly, falsely, wickedly, maliciously and corruptly commit willful and corrupt perjury," etc., is good. *Id.*
6. SAME—FORM OF CONCLUDING.—An indictment concluding "contrary to the act of assembly in such case made," etc., where the offense is prohibited by the common law only, is nevertheless good. *Id.*
7. CRIMINAL PROSECUTION BARRED BY STATUTE.—Where a statute directed "that from and after the passing of the act no person shall be subject to prosecution by indictment" for an offense therein mentioned; it was held that this was a bar to a prosecution for that offense, commenced and prosecuted to conviction before the passing of the statute, but in which no judgment had been pronounced. *Commonwealth v. Duane*, 497.

8. **HOUSE IMPORTS A DWELLING-HOUSE IN CASE OF ARSON.**—In an indictment at common law for arson, it is not necessary to state that the house burnt was a dwelling-house, as this is signified by the word house; and if upon the trial it appear that it was not a house the subject of arson, it is the duty of the court to direct the jury to acquit the prisoner. *Commonwealth v. Posey*, 560.
9. **CONVICTION OF ONE OF SEVERAL FOR RIOT.**—In an indictment for a riot, if one of several be convicted, and the others are not yet arrested, he is subject to punishment, although the others may afterward be acquitted, because he is estopped by the verdict to deny his guilt. *State v. Pugh*, 621.
10. **DEFECT IN INDICTMENT.**—The court will quash an indictment when it is plain no judgment can be rendered in case of conviction, as where no day is stated as that on which the offense was committed. *State v. Roach*, 626.
11. **CRIMINAL LIABILITY OF PUBLIC OFFICER.**—If a public officer intrusted with the exercise of definite powers for the benefit of the community, wickedly abuse, or fraudulently exceed them, he is punishable by indictment, though no injurious effects result to any individual from his misconduct. The crime consists in the public example in perverting those powers to the purposes of fraud and wrong which were committed to him as instruments of benefit to the citizens, and of safety to their rights. *State v. Glasgow*, 629.
12. **POWER OF STATE TO PUNISH OFFENSES AGAINST UNITED STATES LAW.**—An indictment lies under a statute of the state for uttering and publishing counterfeited bills of the branch bank of the United States, notwithstanding the same offense is punishable by the laws of the federal government. *State v. Pitman*, 649.
13. **AMENDING INDICTMENT.**—An indictment may be amended by the grand jury, with leave of the court, at any time before their finding is recorded and they have left the court; and the caption of an indictment may be amended by the minutes of the court, or by what appears on the bill itself, even after conviction and after motion in arrest for the defect. *State v. Creight*, 656.
14. **CAPTION, CORRECTION OF.**—The statement in an indictment that the presentment of the jury is "upon their oaths" is a part of the caption; and if it has been omitted may be inserted even after conviction. *Id.*
15. **INDICTMENT FOR INCITING TO AN ASSAULT.**—One who incites others to the commission of assault and battery, may be indicted and punished as a principal, if the offense be actually committed, although he did not otherwise participate in it. Whatsoever will make a man an accessory before the fact in felony, will make him a principal in treason petit larceny and misdemeanor. *State v. Lyndburn*, 660.

See EVIDENCE, 19; JUDGMENTS, 7.

DAMAGES.

1. **AMOUNT RECOVERED BEYOND PENALTY IN BOND.**—Interest beyond the penalty of a bond may be recovered in the form of damages, and this even against a surety on the bond. *Harris v. Clap*, 27.
2. **PENALTY—LIQUIDATED DAMAGES.**—A. and B. entered into a written agreement, by which A. agreed to convey to B. seven hundred acres of

land, thereafter to be appraised, in part payment of a farm, valued at three thousand seven hundred and fifty dollars, which B. agreed to sell to A.; and it was covenanted that in case either party failed to perform, the party failing "should forfeit and pay to the party who should fulfill the agreement, the sum of two thousand dollars as damages." It was held, according to the intention of the parties, as gathered from the whole agreement, that this sum should be considered as a penalty and not as liquidated damages. *Dennis v. Cummins*, 160.

2. **RECOVERY BEYOND PENALTY IN BOND.**—Where the condition of a bond for the payment of money is broken, interest may be recovered, though it exceeds the penalty in the bond; and a recovery in such cases depends upon principles of law, and is not subject to the arbitrary discretion of a jury. *Smedes v. Hooghtaling*, 250.
4. **DAMAGES FOR BREACH OF COVENANTS IN DEED.**—In an action for a breach of covenants of seisin and quiet enjoyment, the measure of damages in case of eviction is the value of the land at the time of sale, represented by the consideration paid, with interest thereon, from the time the plaintiff loses the mesne profits. *Staats v. Ten Eyck*, 254.
5. **RECOVERY OF COSTS.**—The damages will include the costs which the plaintiff sustained in the action of eviction, but not the costs of the action for mesne profits. *Id.*
6. **APPORTIONMENT OF DAMAGES IN TRESPASS.**—In an action of trespass for assault and battery against several defendants, who pleaded jointly not guilty, a verdict was found for several damages; it was held that the jury may, in such case, sever the damages and apportion them. *Boris v. Lingard*, 684.

See LIBEL, 5; SHERIFFS, 3; SLANDER, 14.

DECEIT.

ACTION FOR DECEIT.—One who makes false representations to another by words and actions, with intent to deceive him, and the latter suffers damage in consequence, an action on the case will lie in his favor, though the defendant has no interest in making such representations. *Hart v. Tallmadge*, 105.

DEEDS.

1. **WHEN DEED REGARDED A MORTGAGE.**—Where an agreement was made between parties to a conveyance, that it should be executed as a mortgage deed to secure the payment of a debt, and, by mistake and accident, it was executed as an absolute deed, equity will regard this deed as a mortgage. *Washburn v. Merrill*, 59.
2. **DEED IMPERFECTLY ACKNOWLEDGED NO EVIDENCE OF NOTICE.**—A deed recorded without a proper probate is no evidence of notice to subsequent purchasers. *Simon v. Brown*, 368.
3. **CONSIDERATION IN DEED.**—A deed, in the body of which no consideration is expressed, but subjoined to which is a receipt by the grantor of "two hundred and fifty specie in full of the consideration money," is sufficient to pass the land. *Hartley v. McNulty*, 306.
4. **TIME OF EXECUTION OF DEED.**—The real time of the execution of a deed may be shown by parol testimony by either party. *Geis v. Odenheimer*, 407.

5. **BURDEN OF PROOF.**—When a deed is antedated, the party claiming under it has the burden of proof as to the time of its execution. *Id.*
6. **WHAT CONSTITUTES A DEED OF BARGAIN AND SALE.**—To constitute a deed of bargain and sale there must be a money consideration, or general words of consideration, under which a pecuniary consideration may be alleged; other land being stated as the consideration is not sufficient. *Cheney v. Watkins*, 530.
7. **SAME.**—If “divers good causes and considerations” are used in the deed, without an express reference to any other consideration, the party may aver what the consideration was, and if this be money, it will make it a deed of bargain and sale. *Id.*
8. **COVENANT TO STAND SEISED.**—If the consideration is love, marriage, or natural love and affection, the deed will operate as a covenant to stand seised. *Id.*
9. **DEED TO HAVE OPERATION IF POSSIBLE.**—If a deed will not have operation in one way, it may operate in some other way; and although a deed cannot operate as a bargain and sale, it may operate as a feoffment. *Id.*

See COVENANTS, 2; EVIDENCE, 12, 16.

DEMAND.

DUTY OF ONE BOUND TO DELIVER PROPERTY.—Where an obligation is payable in property on demand, and the obligor has a known place of residence at the time the contract is made, the obligee must, as a general rule, make demand at the residence of the obligor, before he can maintain an action; but there are exceptions to this rule arising from special contract, from the debtor not having a known place of residence in the state at the time of the contract, from a subsequent change of residence, or from other special circumstances or considerations. *Chambers v. Winn*, 713.

DEVISE.

See WILL, 7.

DOWER.

WHEN IMPROVEMENTS NOT SUBJECT TO DOWER.—The owner of a tract of land sold it with a mill thereon. The mill was subsequently carried away and another built on the same site. A third mill, upon a more extensive plan, was afterward built. The vendor's widow was held to be entitled to dower in the land only, and not in the mill. *Braxton v. Coleman*, 592.

EJECTMENT.

POSSESSION AS A BAR TO RECOVERY.—Actual possession under an adverse claim for twenty years and upward, with a claim of title in other lands forming a part of the lot of which actual possession is taken and by right of each possession, is a bar to a recovery in ejectment. *Jackson v. Bowen*, 193.

See MESNE PROFITS, 5.

EQUITY.

1. **WHEN ANSWER CONCLUSIVE.**—The answer of a respondent to a bill in equity praying for a disclosure is conclusive upon the petitioner as to the truth of its statements. *Pollard v. Lyman*, 63.
2. **RELIEF IN EQUITY.**—Mere loss in a bargain, loss resulting not from fraud, nor the failure of a warranty, but from bad calculation or the want of vigilance, is not a ground for relief in equity. *Id.*
3. **SAME.**—Mere inadequacy of consideration, where the stipulated consideration is actually received, affords no ground of relief in equity. *Id.*
4. **MATTERS OF ACCOUNT.**—Although there may be a remedy at law in matters of account, yet, if the relief be doubtful or inadequate, equity will entertain the bill, in order the more effectually to give relief generally. *Ludlow v. Simond*, 291.
5. **ALLOWANCE FOR IMPROVEMENTS.**—Equity will not relieve against a party in possession under a defective title, unless an allowance be made for improvements. *Dilworth v. Sinderling*, 469.
6. **ISSUE, WHEN DIRECTED.**—If a bill in equity charges fraud, and the testimony be conflicting and unsatisfactory, an issue ought to be directed. *Hoos v. Marquess*, 570.
7. **SAME.**—Where a son had obtained a deed from his father, for ninety acres of land and five slaves, in consideration of a certain sum and maintenance for life, after which he sold the land to a third person, who filed a bill alleging that deed to have been recorded, but to have been subsequently destroyed, and another substituted for it of a different import, and the land sold again by the first donor, to a purchaser, with notice of the plaintiff's title, whose deed had not been recorded; it was held that an issue should be directed as to the fact of substitution, and if so, what were the terms of the first deed. *Id.*
8. **SALE OF LAND.**—Where a tract of land was sold as containing eleven hundred acres, more or less, at a fixed price, and it turned out that it contained less than the quantity stated, the purchaser was held not entitled to relief in equity. *Pendleton v. Stewart*, 583.
9. **RELIEF IN EQUITY.**—A court of equity will not aid a party to set up a legal defense which he could have made, and which he has omitted to make at the proper time in an action at law. *Smith v. Durrett*, 714.
10. **RELIEF WHEN TITLE DEFECTIVE.**—Where the title of the land sold is defective, equity will, at any time before the conveyance, enjoin the collection of the purchase-money, and set aside the sale on equitable terms. *Bibb v. Prather*, 711.

See FRAUD, 3; FRAUDULENT CONVEYANCE, 8; SPECIFIC PERFORMANCE, 6.

ESTOPPEL.

- CONCEALMENT OF TITLE.**—Where a man stands by and sees another purchasing land to which he has a prior claim, and does not disclose his title, his concealment is a fraud, which will forfeit his title. *Engle v. Burns*, 593.

See COVENANTS, 5.

EVIDENCE.

1. **IN TRIAL FOR FORGERY.**—The person whose instrument is alleged to have been forged is not a competent witness to prove the forgery, un-

- less the instrument said to have been forged is produced at the trial. *Commonwealth v. Hutchinson*, 1.
2. **COLLATERAL AGREEMENT.**—Where a conveyance was made by a debtor to his creditor, to sell the land to satisfy his claim, he giving to the debtor his note for the estimated balance that might remain after such sale, it was held in an action on the note between the parties, that evidence of a collateral parol agreement was admissible to show that any deficiency arising from the sale should be deducted from the amount of the note. *Lewis v. Gray*, 21.
 3. **SHOWING MISTAKE.**—Where, by a mistake, an absolute deed was made instead of a mortgage, parol evidence is admissible to show the mistake. *Washburn v. Merrills*, 52.
 4. **IMPEACHMENT OF WITNESS.**—A witness may be impeached by showing that at the time the facts sworn to occurred he was intoxicated. But the intoxication must be proved by direct evidence, or by the acts and conduct of the witness, and not by the quantity of spirituous liquor he had previously drank. *Tuttle v. Russell*, 89.
 5. **CONSPIRACY TO DEFRAUD.**—In an action against A., B. and C. for a conspiracy to defraud such merchants and traders as they might be able to impose on by representing A., who was insolvent, as a man of large property and safely to be trusted, evidence that the defendants made such representations to other persons than the plaintiff, in consequence of which such persons, without the request of the defendants, recommended A. to the plaintiff, whereby the plaintiff was induced to give him credit, is admissible. *Gardner v. Preston*, 91.
 6. **ADMIRALTY SURVEYS.**—Admiralty surveys as to the unseaworthiness of vessels are not evidence of the facts stated in them, as a party would thereby be concluded by the testimony of persons whom he had no opportunity to cross-examine. *Abbott v. Sebor*, 129.
 7. **PAROL TESTIMONY, WHEN ADMISSIBLE.**—Parol testimony cannot be received to show that a deed stating a course for thirty-six chains was intended to express twenty-nine. *Jackson v. Bowen*, 192.
 8. **AS TO PROPERTY SHIPPED.**—A letter from a captain to his owner cannot be received on the part of the owner, as evidence of the character of the property on board unaccompanied by invoices or bills of lading. *Crousillat v. Ball*, 375.
 9. **HANDWRITING OF SUBSCRIBING WITNESS.**—If a subscribing witness to a will be beyond the jurisdiction of the court, his handwriting may be proved as if he were dead. *Eagles v. Brington*, 411.
 10. **CONTENTS OF STOLEN INSTRUMENT.**—Upon the trial of an indictment for stealing a bank-note, bill obligatory, etc., evidence of the contents of the instrument may be given, without showing a notice to the defendant to produce the original. *Commonwealth v. Messenger*, 441.
 11. **INADMISSIBLE TO SUPPORT CERTIFICATE.**—Parol declarations of the wife are inadmissible, showing that she executed a deed voluntarily, and that if it were not sufficient, she would execute and acknowledge it again, or do any other act to make the deed good. *Watson v. Bailey*, 462.
 12. **DEED INADMISSIBLE IN.**—A record copy of a deed which is not required to be enrolled, cannot, in general, be received in evidence; but

- if possession has been held under it for upward of thirty-nine or forty years, a certified copy may be given in evidence. *Gittings v. Hall*, 502.
13. **INADMISSIBLE AGAINST SURVEY.**—The defendant cannot prove on his trial that the locations made on the plats in the cause, were not in compliance with his instructions to the surveyor. *Id.*
14. **GENERAL REPUTATION.**—General reputation and tradition in a family of the death of one of its members, and of his having died possessed of land, is admissible in evidence as a part of a chain of testimony to prove relationship in an action of ejectment brought by a member of the family claiming land by descent from the deceased. *Puncoast v. Addison*, 521.
15. **INADMISSIBLE IN ACTION FOR PURCHASE-MONEY.**—In an action for the purchase-money for land sold and conveyed, parol evidence cannot be given by a witness to shew that he was seized of any part of the land conveyed, in order to rebut the claim and title of the vendor to any portion of the land included in the deed, or to shew that the title to any part of the land so conveyed was not in the vendor at the time of the conveyance. *Sharpe v. Gibson*, 529.
16. **DEED.**—Neither the record of enrollment nor a copy of a deed, not directly by law to be enrolled, can be admitted in evidence. *Cheney v. Watkins*, 530.
17. **PAROL, NOT ADMISSIBLE TO EXPLAIN TESTATOR'S INTENTION.**—When a will is exhibited for probate, if a witness give additional testimony of parol declarations by the testator, for the purpose of explaining the written will, such testimony being without any notice thereof to the parties interested in the estate, ought not to be recorded, nor afterward read in evidence in any controversy concerning the will without consent of parties. *Read v. Payne*, 550.
18. **PROCEEDINGS IN A FOREIGN COUNTRY, HOW PROVED.**—The proceedings in a civil suit in a foreign country may be proved by depositions and testimony *dehors* the proceedings, as for instance the defendant's own letters. *Young v. Gregorie*, 557.
19. **DYING DECLARATIONS.**—On an indictment for murder, the declarations of the deceased may be received in evidence, but then they must be the declarations of a dying man—of one so near his end that no hope of life remains—for then the solemnity of the occasion is a good security for his speaking the truth, as much so as if he were under the obligation of an oath; but if at the time of making the declarations he had reasonable prospects and hopes of life, such declarations ought not to be received. Therefore, in this case, declarations of the deceased were rejected made the day after he was wounded, six or seven weeks before his death. *State v. Moody*, 616.
20. **JUDICIAL NOTICE.**—The civil divisions of the state into counties, etc., must be taken notice of judicially by the court. *State v. Glasgow*, 629.
21. **ACTION FOR MALICIOUS PROSECUTION.**—In an action for malicious prosecution, a copy of the indictment duly certified is admissible in evidence, and the original need not be produced. *Fant v. McDaniel*, 630.
22. **CROSS-EXAMINATION OF WITNESS.**—In the cross-examination of a witness, a party has a right to stop him if his answer relates to matters which the party who calls the witness has no right to introduce in

evidence; and the latter cannot insist on his fully answering. *Grader v. Bowles*, 665.

See DEEDS, 2, 4; FRAUDULENT CONVEYANCE, 3, 4, 5; INSURANCE, 20, 23, 27; SURETYSHIP, 3.

EXECUTION.

EQUITY OF REDEMPTION LIABLE TO.—An execution may be levied upon an equity of redemption as real estate, and the creditor, after having the same appraised and set off to him according to the statute, acquires all the right of the mortgagor in the premises. *Punderson v. Brown*, 53.

EXECUTORS AND ADMINISTRATORS.

1. **ACTION OF TRESPASS SURVIVES TO ADMINISTRATOR.**—An action of trespass for entering upon the land and burning the mills of the intestate, in his lifetime, survives to the administrator. *Grinold v. Brown*, 71.
2. **PURCHASING TRUST ESTATE.**—Where a power is given to an executor to sell for the benefit of a third person, a purchase by the executor from his *cestui que trust*, is not favored in equity, and he cannot maintain a bill for specific performance based on such purchase. *Munro v. Allaire*, 330.
3. **SAME.**—It seems that a purchase by a trustee, who is also a *cestui que trust*, may be sustained, if it be to save the property from loss. *Id.*
4. **LIABILITY OF, FOR INTEREST.**—An administrator is liable for interest where he has been guilty of neglect in not putting out the money of the intestate, or has made use of it himself; and he is bound to show what has been done with the money to avoid the conclusion that he has made use of it; but he is not liable for interest until after twelve months from the death of his intestate. *Fox v. Wilcox*, 433.

FACTOR.

LIEN OF.—Where an agent or factor is intrusted with goods to sell, and pay a debt of his principal with the proceeds, he has only a qualified property in the goods, and his executors, after his death, cannot lawfully dispose of the goods, but may retain them for his lien. *Gage v. Allison*, 682.

FEMES COVERT.

See ACKNOWLEDGMENT, 1; EVIDENCE, 11.

FERRIES.

FRANCHISE—VESTING AND FORFEITURE.—The franchise of a ferry was granted to one, his heirs and assigns, so long as he and they should well and faithfully keep the ferry according to the directions of the grant. It was held that the right to the franchise did not vest until the grantee commences the keeping of the ferry; that the right to the franchise is forfeited by an unreasonable delay in putting the ferry in use; and that the forfeiture is not excused by the death of the first grantee soon after the grant and the disability of his heir, no exception having been made in the grant on account of such disability. *Clarke v. Calloway*, 706.

FIXTURES.

WHAT MAY BE REMOVED.—Where a lot and still-house thereon was sold by the sheriff on execution, it was held that the pumps, cisterns, iron grating and door, distillery and horse-mills, passed to the purchaser, but not the joists, vats, buckets, pickets and fosses, which were not fixed to the freehold. *Kirwan v. Latour*, 519.

FORGERY.

See CRIMINAL LAW, 1.

FRAUD.

1. **IN SALE OF REAL ESTATE.**—The plaintiff was induced to buy and take a warranty deed of certain lands from N. by the fraudulent and false representations of N. and others, who had combined together for the purpose that N. had a good title, and that the lands were of good quality; it was held that an action on the case would lie against all the confederates for this fraud, on proof that the title to a part of the land was never in N., and that the residue was of no value. *Bostwick v. Lewis*, 73.
2. **IN SALE.**—Though there be some suspicious circumstances attending the purchase and transfer of property, yet if they have been fairly submitted to a jury, the court will not infer there was any fraud so as to warrant a new trial. *Hollingsworth v. Napier*, 268.
3. **JURISDICTION OF LAW AND EQUITY.**—Courts of equity and courts of law have concurrent jurisdiction in cases of fraud. *White v. Jones*, 564.
4. **AT LAW PATENT VOID FOR.**—A court of law can avoid a patent for fraud, but in such case the remedy is more effectual in a court of equity, which, upon a consideration of all the circumstances, can establish more complete justice between the parties than a court of common law. *Id.*
5. **IN RESPECT TO QUANTITY OF LAND SOLD.**—Where a contract was made for the sale of nine hundred acres of land, more or less, and the tract found to contain only seven hundred and sixty-five acres, the purchaser will be relieved in equity, it appearing that the seller knew of the deficiency at the time of the sale, but did not disclose it. *Bedford v. Hickman*, 590.
6. **BY-BIDDING.**—Where a by-bidder, under an agreement with the owner, runs up the price of property, and it is knocked down to him, he shall hold the property against such owner; because the agreement is fraudulent, and a party to a fraudulent agreement, cannot allege that it was fraudulent, to avoid its effect. *Troughton v. Johnston*, 626.
7. **CONTRACT FOR SALE OF LAND VOID.**—Where the vendor of a tract of land fraudulently misrepresents the location and quantity of the land, the contract of sale will be rescinded in equity. *Daniel v. Pogue*, 708.
8. **AS TO QUANTITY OF LAND.**—Where the vendor of a tract of land sold at a certain price per acre, represented it as containing a certain number of acres, when in fact it contained much more, the vendee cannot have set off to him the number of acres represented by the vendor

to be in the tract, but the transaction will be altogether rescinded on equitable terms. *Id.*

9. **MISREPRESENTATION IN SALE OF LAND.**—Where a party purchased land of another, which neither of them had never seen, the purchaser taking the representations of a third party as to its quality and location, the maxim *caveat emptor* applies, and having taken no covenant of warranty as to the quality or location of the land, the purchaser is without remedy, if the quality or location be not such as represented. *Gimblin v. Harrison*, 720.

See **ESTOPPEL**, 1.

FRAUDULENT CONVEYANCES.

1. **CONVEYANCE, WHEN NOT.**—A verdict for a large sum of money was obtained against a debtor; and on the evening of the same day he conveyed all his property to a trustee of his own choice for the benefit of all his creditors. The trustee lived at a distance of twenty-three miles, and did not learn of the deed until four days afterward, when he gave his assent. The debtor continued in possession of the furniture and goods the next day and part of the following day, when they were levied on at the suit of a creditor. The title deeds of the real estate also remained in the possession of the grantor for a period of nearly two months. It was held that the deed was valid and took effect from its execution. *Wilt v. Franklin*, 474.
2. **SCHEDULE OF PROPERTY CONVEYED.**—The want of a schedule of property conveyed by a general assignment for the benefit of creditors is a circumstance proper to be taken into consideration, but is not in itself conclusive evidence of fraud. *Id.*
3. **DECLARATION OF PARTIES TO.**—Where a conveyance is impeached for fraud as to creditors, the declarations of the parties to it at the time of its execution are inadmissible to show that it was not made with a fraudulent intent. *Gruder v. Bowles*, 665.
4. **EVIDENCE SHOWING.**—Although a voluntary conveyance may be valid, yet where there are other circumstances of a fraudulent intention, the deed being voluntary and gratuitous, and the donor being in debt, it is evidence to show an intent to defraud creditors; and a deed of conveyance made with the design to defraud one creditor is void as to every other creditor. *Id.*
5. **PROOF OF.**—Direct proof of a combination in a conveyance to defraud creditors, cannot, in general, be expected; but from all the circumstances attending the transaction, the court may infer the conveyance to be fraudulent. *Bradley v. Buford*, 703.
6. **WHAT CONVEYANCE FRAUDULENT.**—A conveyance of all the vendor's property and choses in action, especially when secretly made, will be considered fraudulent as to creditors. *Id.*
7. **CREDIBILITY OF PARTIES AS TO INDEBTEDNESS.**—The vendee in a conveyance purporting to be made to secure his debt, having permitted the vendor to assert in his presence that there was nothing due him, without contradicting him, destroys the credibility of the answers of the vendor and vendee to a bill, where they assert the existence of such indebtedness. *Id.*

3. **RELIEF ON SETTING ASIDE.**—Upon setting aside a fraudulent conveyance, the vendee will be permitted to show the real amount due him from the vendor, and to share *pro rata* in the proceeds of the property; upon condition, however, that he first surrenders all property which has come into his possession under the conveyance. *Id.*

GENERAL AVERAGE.

1. **CONTRIBUTION FOR DAMAGE TO PERISHABLE ARTICLES.**—All damage directly resulting from a jettison should be contributed for, though it happen to articles described as perishable, and which remain in specie. *Maggrath v. Church*, 173.
2. **LIABILITY OF FREIGHT FOR CONTRIBUTION.**—The freight actually gained or earned at the time a voyage is broken up, should be the basis for estimating a rule of contribution. *Id.*
3. **WHAT SUBJECT TO.**—Wages and provisions necessary for the support of the crew during the detention of a vessel captured and carried in for adjudication, are properly subjects of general average. *Leavenworth v. Delafield*, 201.
4. **FREIGHT, ESTIMATION OF, IN CASE OF CAPTURE.**—If a vessel be captured during her voyage, the freight will be chargeable up to the day of such capture, in a settlement of proportion for general average. *Id.*
5. **AMOUNT ON WHICH CALCULATED.**—The amount on which a general average, in case of capture, is to be calculated, is the first cost or invoice price of the cargo, and charges at the port of departure; on the vessel, four-fifths of its value at the same place; and on the freight at one-half agreed to be paid. *Id.*
6. **WAGES AND PROVISIONS SUBJECTS OF.**—Where a vessel in consequence of damages was obliged to seek a port of safety in order to refit, the wages and provisions from the moment of bearing away to the period of setting out again on her original voyage constitute a subject of general average, the proportion of which may be recovered in an action of *assumpsit*, by the owners of the ship against the proprietors of the cargo; and consequently it is a charge for which the insurers on the cargo are liable. *Walden v. Le Roy*, 236.

IMPROVEMENTS.

ALLOWANCE FOR, BY OCCUPANT OF LAND.—A *bona fide* occupant of land, believing himself the owner, is entitled to be paid the enhanced value of the land, by reason of his improvements made after, as well as before, the commencement of an action by which he was evicted, and he is liable for rents and profits from the time that he had notice of the adverse claim. *Whitledge v. Wait*, 721.

See DOWER, 1; EQUITY, 5.

INDICTMENT.

See CRIMINAL LAW, 1, 6, 10, 13, 14.

INSURANCE—MARINE.

1. **CONSTRUCTION OF WORDS "AT AND FROM" IN POLICY.**—The words "at and from" in a policy on goods, means from the time the goods

are laden on board the vessel; but applied to a ship, they mean the period of her stay in the port from the time of her arrival. *Patrick v. Ludlow*, 130.

2. **DEVIATION.**—The master of a vessel received information that French privateers were cruising in the windward passage, and in the usual route from Surinam, he, therefore, determined to take the leeward passage, and touched at Demarara to take the protection of a British convoy then about to sail; but a few hours after his arrival there, the vessel was driven to sea in a gale of wind and afterward continued her voyage without convoy, and was captured by a French privateer. This was held not to be a deviation, as the master had acted *bona fide*, and with the sole view of avoiding danger, and to seek the safest course home. *Id.*
3. **ON PROFITS.**—A policy on profits on goods is a valid policy, and the insured may recover a total or an average loss, according as the loss of the goods is total or partial. *Abbott v. Sebor*, 139.
4. **TOTAL OR PARTIAL LOSS.**—It seems that the proper rule to ascertain whether there is a total or partial loss of profits, is to determine whether more or less than one-half in value of the subject has been lost. *Id.*
5. **PARTIAL LOSS ONLY.**—Where the assured, after an abandonment, affirmed a purchase of the ship by the master for the benefit of the assured, it is a waiver of the abandonment, and the assured is entitled to recover for a partial loss only. *Id.*
6. **PERISHABLE ARTICLES.**—Where articles are included in a memorandum as perishable, they must be completely destroyed before the insured can recover as for a total loss. *Maggrath v. Church*, 173.
7. **INSURER LIABLE IN FIRST INSTANCE FOR CONTRIBUTION.**—An insured may recover the contributory share due him for loss by jettison in the first instance from the insurer, before resorting to those entitled to contribute. *Id.*
8. **RISKS COVERED BY GENERAL POLICY.**—A general policy, unaccompanied with any warranty, covers war risks of all kinds and of all countries. Under such circumstances a false clearance is immaterial, when the vessel actually sailed on the voyage intended, and the assured is not bound to disclose it. *Barnewall v. Church*, 180.
9. **SEAWORTHINESS.**—Seaworthiness is always implied in a policy of insurance, and is not at the risk of the insurer. *Id.*
10. **WHAT CONSTITUTES LOSS OF VOYAGE.**—If a vessel be rendered, by the perils against which she is insured, unable to proceed with her original cargo, it is a loss of the voyage, though she may be capable of performing it with a lighter cargo. *Abbott v. Broome*, 187.
11. **ABANDONMENT.**—When a vessel cannot be repaired for half her value, the insured is entitled to make an abandonment. *Id.*
12. **WAIVER OF ABANDONMENT.**—If a vessel be duly abandoned, and the abandonment refused, and a sale be made for the benefit of all concerned, under an admiralty order adjudging her not worth repairing, and she purchased by the supercargo, a part owner, it is no waiver of the abandonment, notwithstanding on her arrival home she is sold at auction by the insured for more than she cost, and he, at the time of action brought, has the proceeds in his hands; and he is not obliged to

- make a tender of her to the underwriter when she arrives, nor of her proceeds after the sale. *Id.*
13. WHAT CONSIDERED A LOSS WITHIN POLICY.—If a vessel be obliged to put into port from necessity, and a pestilential disorder break out which disables her crew and renders it impossible for her to pursue her voyage, it is a loss within the perils of a policy. *Williams v. Smith*, 209.
14. WHAT CONSTITUTES A BLOCKADE.—To constitute a blockade, as affecting a policy of insurance, there must be an actual existing force before the port at the time it is entered. The *animus revertendi* of the blockading fleet does not continue the blockade, nor is the entry of a neutral, after being notified, a breach of his neutrality, if the blockading force be not before the port. *Id.*
15. POLICY ON FREIGHT.—A valued policy on freight was stated to be “at and from” one port to another, and “at and from thence” back to the original port, and a premium was demanded double that which was demanded for the outward voyage; it was held that freight to the full amount of the valuation was covered on each voyage, and the insured on a capture on a return voyage entitled to recover the full amount of his policy, without making any deduction for the freight received on the outward risk. *Davy v. Hallett*, 241.
16. VALUED POLICY, WHEN ATTACHES.—On a valued policy on freight, if there be an inchoate right to some, and the transaction *bona fide*, the value cannot be inquired into. *Id.*
17. RIGHTS OF AN INSURED ON VESSEL AND FREIGHT.—If a ship-owner have his vessel and freight insured with two different underwriters, and on a capture abandon first to those on the vessel, and then to those on the freight, taking afterward fifty per cent. of his claim on the underwriters on the vessel, and in payment of the other fifty an assignment of their rights in the vessel, he will be entitled to receive the freight which they would have been entitled to, and to recover from the insurers of the freight the full amount of his policy, deducting the pro rata freight earned previous to the abandonment on the voyage on which captured. *Id.*
18. POLICY ON FREIGHT—AMOUNT RECOVERED.—Under an open policy on freight, the gross amount is on a total loss, the amount to be recovered, without being subject to a deduction for expenses of wages and provisions. *Stevens v. Columbian Ins. Co.*, 247.
19. EXPENSES DURING EMBARGO.—The charterer of a ship at so much per month cannot, on an insurance on his cargo, recover expenses occasioned during an embargo; such not being the subject of a general average and not embraced by the terms of the policy. *Penny v. N. Y. Ins. Co.*, 260.
20. EVIDENCE TO CONTROL POLICY.—A policy of insurance may be explained and contrlled by the written application to make the insurance. *Norris v. Ins. of N A.*, 360.
21. RISK ASSUMED BY INSURER.—To subject an insurer to a loss, the risk run must correspond with that understood and intended to be run at the time of subscribing the policy. *Id.*
22. INSURER BOUND BY USAGE.—An insurer is bound to inform himself of a general and well established usage of trade. *Id.*

23. **CAPTAIN'S PROTEST**—A captain's protest may be received as evidence in an action on a policy of insurance. *Crouillat v. Ball*, 375.
24. **BROKER AGENT FOR BOTH PARTIES**.—A broker on effecting a policy is agent of both parties, and notice of abandonment to him is sufficient to charge the insurer. *Id.*
25. **DURATION AND EXTENT OF POLICY**. — Policies effected in time of peace continue though a war breaks out; the insured however, must not do anything to add to the risk of the insurer. *Id.*
26. **BARRATRY OF MASTER**.—On a declaration stating a loss by capture, there can be no recovery on the barratry of the master, and where in a special verdict the jury have found certain misconduct of the master, the court will not infer that the risk of the insurer was increased thereby. *Id.*
27. **MARINE PROTEST EVIDENCE**—A protest made in Philadelphia, where both the insurer and insured resided, and without notice to the insured, was held to be evidence in an action between those parties to show the necessity of a deviation. *Brown v. Girard*, 400.
28. **PROOF AS TO SEAWORTHINESS**.—A vessel insured must be in all respects fit for the trade wherein she is employed; and generally the proof lies on the insured; but where it appears that the loss may be fairly imputed to sea damage or other misfortune, the proof lies on the insurer, if he defends himself on the ground of unseaworthiness. *Id.*
29. **WHEN RISK BEGINS**.—Upon an insurance "at and from" a foreign port the risk commences as soon as the vessel has been safely moored twenty-four hours after her arrival at port. *Garrigue v. Caze*, 493.
30. **SEAWORTHINESS**.—Upon an insurance "at and from" a warranty of seaworthiness must be referred to the commencement of the risk; and if between that time and the time of sailing she becomes unfit for sea, without the fault of the insured, and is afterward lost by the perils of the sea, the insured can recover. *Id.*
31. **PERIL WITHIN POLICY**.—A leak occasioned by rats, without the neglect of the captain, is a peril within the policy. *Id.*
32. **OBLIGATION OF INSURED**.—The insured is not bound to anticipate a capture and condemnation in violation of the law of nations, and is under no obligation to communicate facts and circumstances from which such capture and condemnation might be apprehended, unless they are such as to create so general an impression of danger as must enhance the premium of insurance; but a knowledge of facts and circumstances of the latter description is not to be presumed against the insured; and although he may be aware that certain circumstances may become ground of condemnation, in violation of the law of nations, there is no implied warranty that they do not exist in relation to the property insured. *Marsh v. Muir*, 648.
33. **BREACH OF BLOCKADE TO INVALIDATE**.—A mere intention to enter a blockaded port, without any actual attempt after being warned off, is no breach of the blockade, and no cause for condemnation, either by international law or by the treaty between the United States and Great Britain; and it was held that where an American vessel and cargo were condemned by a British court of admiralty, for persisting in

an intention to enter a blockaded port, that the condemnation was illegal, and the insurers were liable. *Williamson v. Tanno*, 654.

34. **SEAWORTHINESS.**—Where a vessel the day after sailing springs a leak, which increases to such a degree as to compel her to seek a port of safety without having encountered any gale, or sustained any damage from the dangers of the sea, she must have been presumed to have been unseaworthy at the time she sailed, and the insurers are discharged. *Wallace v. De Pau*, 662.
35. **ABANDONMENT, RIGHT OF.**—"Where a policy provided that no abandonment of the neutral property hereby insured shall take place in case of capture or detention by the British, until it be condemned, and the proceedings of the court and sentence of condemnation produced to substantiate the loss; and in case of capture or detention by any other power, the like document shall be produced until satisfactory reasons can be given that they cannot be obtained:" it was held that the right to abandon for a capture was restrained until after condemnation, whether the capture were by another power or by the British. *De Pau v. Russell*, 676.
36. **SAME.**—Although there is no restriction in the policy, the insured cannot abandon for a capture, if, before giving notice of abandonment, he received intelligence that the vessel has been released, and has proceeded on her voyage. *Id.*
37. **SAME.**—The insured cannot abandon on the ground that the voyage has been defeated by a capture after intelligence that the vessel has been released, and has arrived in safety at her destined port; and when it does not appear that the extent of the loss on the voyage is such as to justify an abandonment, as in case of a total loss. *Id.*
38. **PERILS INSURED AGAINST.**—An extraordinary duty laid on the goods in the destined port, between the capture of the vessel and her release and arrival there, is not covered by the clause insuring against "all unavoidable perils, losses and misfortunes to the damage of the goods." *Id.*
39. **INTEREST ON AMOUNT OF AVERAGE.**—Interest is not recoverable on the amount of an average, which was admitted by the underwriters, where the insured insisted on a right to abandon and recover for a total loss. *Id.*
40. **MISREPRESENTATION AND CONCEALMENT.**—A policy of insurance was effected upon a vessel represented to be American, and furnished with American papers, but in reality owned by Spanish subjects, which fact was not disclosed to the insurers. The policy was held void from the beginning, on the ground both of misrepresentation and concealment; and the insured cannot recover, whether the loss were caused by the misrepresentation, or concealment, or otherwise. *Price v. De Pau*, 680.

INTEREST.

1. **RULE AS TO.**—It is now a settled rule that interest is recoverable for money lent and advanced. *Dikworth v. Sinderling*, 469.
2. **WHEN ACCRUES.**—Where money is payable on demand, interest does not accrue until a demand is made; when no time is mentioned the money is payable immediately without a demand, and interest accrues immediately. *Freeland v. Edwards*, 620.

3. **RULE AS TO CALCULATION OF.**—In equity, as a general rule, interest upon interest is never allowed. However, when the sum is ascertained and the annual payment of it forms part of the contract, where it is so specific that an action of debt may be sustained, and interest recovered by way of damages for the detention, and particularly where the payment of the principal sum is postponed to a very distant period, upon the faith of the regular and punctual discharge of the interest, interest upon interest ought to be allowed. *Kennon v. Dickins*, 642.

See EXECUTORS, 4; TRUSTEES, 1.

JOINT-TENANCY.

- SEVERANCE OF.**—A mortgage executed by two out of three joint-tenants is a severance of the joint-tenancy. *Simpson v. Ammons*, 425.

See MESNE PROFITS, 1.

JUDGMENTS.

1. **EFFECT OF, OBTAINED IN ANOTHER STATE.**—A judgment recovered in one state is not conclusive evidence of a debt in an action brought on such judgment in another state, but in the latter the inquiry may be made whether the court in the former state had properly jurisdiction of the defendant. *Bartlet v. Knight*, 36.
2. **CONSTITUTIONAL PROVISION.**—Although the mode of authenticating such judgments has been provided for by the act of congress, pursuant to the constitution, yet the effect of such authentication is not declared by the act. *Id.*
3. **OF A FOREIGN COURT OF ADMIRALTY.**—The sentence of a foreign court of admiralty is conclusive, and cannot be impeached elsewhere until it is regularly set aside in the country where it was delivered. *Stewart v. Warner*, 61.
4. **SAME.**—As between insurer and insured, the decree of a foreign court of admiralty is conclusive only where warranties are inserted in the policies. *Crousillat v. Ball*, 375.
5. **VOID FOR UNCERTAINTY.**—Where the plaintiff in ejectment locates his claim on the plats in two ways, and there is a general verdict and judgment rendered thereon, such judgment is void for uncertainty. *Gittings v. Hall*, 502.
6. **SENTENCE OF FOREIGN ADMIRALTY COURT.**—A sentence of condemnation by a foreign court of admiralty, which appears on the face of the proceedings to have been founded on facts which do not warrant the judgment, is not conclusive of the legality of the condemnation, in a question between the insured and the underwriters. *Williamson v. Tunno*, 654.
7. **ARREST OF.**—Judgment can be arrested only for defects appearing on the record; and an objection which must be established by extrinsic proof, as that the amendment of a defect in an indictment was made after bill found, is not a good ground for a motion in arrest. *State v. Creight*, 656.

JURISDICTION.

See CRIMINAL LAW, 12.

JURY.

1. **CHALLENGE TO THE ARRAY.** — A challenge to the array of the panel will not be allowed for the reason that the clerk who issued the warrants to the constables to summon the jury is a party to the action. *Hart v. Tallmadge*, 105.
2. **INSTRUCTION TO.** — The court may properly instruct the jury on the legal effect of a certain instrument, without violating the rule that an instruction shall not be given on the weight of evidence. *Austin v. Richardson*, 543.
3. **"GOOD AND LAWFUL MEN."** — The words "good and lawful men" in the caption of an indictment, inquest, etc., mean freeholders. *State v. Glasgow*, 629.
4. **RIGHT OF TRIAL BY.** — A statute providing that upon the affirmance of a judgment in the court of appeals, judgment shall be given by that court against a surety on a supersedeas bond, is unconstitutional, in that it deprives the surety of a right of trial by jury in a case where it existed before the adoption of the constitution. *Gullion v. Bowhore*, 708.

See CRIMINAL LAW, 2, 3.

LEASE.

COVENANTS IN. — Where a mill and premises were leased, and the lessee covenanted to leave it in repair, and the mill during the lease is carried off by ice, it was held that the lessee was bound to pay the rent, and to perform the covenants including the covenant to repair. *Ross v. Overton*, 552.

LIBEL.

1. **JUSTIFICATION.** — To charge a counselor at law with offering himself as a witness, in order to divulge the secrets of his client, is libelous, and it is no justification that he disclosed matters communicated to him by his client which had no relation or pertinency to the cause in which he was engaged. *Riggs v. Denniston*, 145.
2. **SAME.** — To charge a commissioner of bankruptcy with being a misanthropist, a violent partisan, stripping the unfortunate debtors of every cent, and then depriving them of the benefit of the act, is libelous; and the defendant, to make out a justification of the charge, must show that the plaintiff as commissioner perverted the law to such oppressive purposes. *Id.*
3. **CHANGE OF VENUE.** — In an action for a libel, the court will not, upon the common affidavit, change the venue from the county in which the libel was circulated to that in which it was printed and first published. *Clinton v. Crosswell*, 235.
4. **PUBLICATION OF.** — Distributing papers containing libelous matter, and the fact of the clerk of the printer receiving payment for them, is evidence of the publication of the libel. *Respublica v. Davis*, 366.
5. **MITIGATION OF DAMAGES.** — In an action for libel against the printer of a newspaper, it is not a justification in law that the publication was made at the instance of a person whose name was given at the time, and who paid for it in the usual course of business, though it may go in mitigation of damages. *Runkle v. Meyer*, 393.

6. **PRIVILEGED PUBLICATION.**—The publication of the truth from good motives and for justifiable ends, though it reflect on the government or its magistrates, does not constitute a libel; but it is otherwise when done with an evil intent. *Republia v. Dennis*, 402.

LIEN.

EQUITABLE LIEN.—A person obtained the indorsement of another by promising in a letter to give him a bill of sale on certain personal property as security; before giving the bill of sale he died, and the indorser was obliged to pay the note. It was held that the indorser was entitled to an equitable lien on the property in preference to other creditors. *Read v. Gaillard*, 696.

See **FACTOR**, 1.

MALICIOUS PROSECUTION.

1. **MALICIOUS PROSECUTION.**—An action of malicious prosecution will lie where the criminal prosecution was commenced, although no indictment was preferred. *Shock v. McChesney*, 415.
2. **WANT OF PROBABLE CAUSE.**—In an action for a malicious prosecution the declaration must aver the want of probable cause, and even the allegation of the want of legal or justifiable cause will not be sufficient, and the declaration is fatal even after verdict. *Young v. Gregorie*, 556.
3. **PLEADING PROBABLE CAUSE.**—Probable cause is not admissible in evidence under the general issue, in an action for malicious prosecution, but must be specially pleaded. *Fant v. McDaniel*, 660.

See **EVIDENCE**, 21.

MANDAMUS.

1. **RETURN TO.**—In a return to a *mandamus* the same certainty is required as in declarations and pleadings, and nothing can be supplied by intendment or inference. *Brosius v. Reuter*, 534.
2. **FACTS STATED IN RETURN.**—The facts stated in a return to a *mandamus* are supposed to be true, and are not traversable; if they are false, the remedy is by action against the person making the return. *Id.*
3. **TO PERFORM A PUBLIC DUTY.**—Where a duty to erect a bridge was imposed upon the county court by statute, a *mandamus* is the proper remedy to compel that court to erect a bridge across a public road. *Brander v. Justices*, 606.

MESNE PROFITS.

1. **RECOVERY AGAINST JOINT-TENANT.**—Joint-tenants or tenants in common recovering in ejectment are bound to obtain possession under the proper writ or otherwise; and in case they neglect to do so, they will be limited to a recovery of mesne profits to a reasonable time after judgment, which in this case was held to be a month. *Hare v. Fery*, 358.
2. **EXTENT OF RECOVERY OF.**—If the plaintiff can prove that his title accrued before the time of the demise laid in the action of ejectment, and that the defendant had a longer possession, he may recover the ante-

cedent profits; but in that case, the defendant can controvert his title. *West v. Hughes*, 539.

2. **LIABILITY OF DEFENDANT.** — From the time of the demise until the plaintiff is put in possession, the defendant is accountable for the profits. If another person enters into possession during the time the ejectment is pending, the defendant is still answerable, for it will be presumed the entry is made by defendant's consent: but if the defendant can prove that the plaintiff himself received the profits, he is not then liable for such profits. *Id.*
4. **HOW ASCERTAINED.** — In an action to recover mesne profits, to ascertain the profits, the plaintiff may either prove the profits received from the land, or the probable value of the land. *Id.*
5. **JUDGMENT IN EJECTMENT.** — In an action of ejectment to recover mesne profits, the defendant is not estopped by the judgment against him in ejectment, from proving that the plaintiff was in possession of the land between the date of the demise laid in the declaration and the judgment. *Id.*
6. **ACTION FOR, WHEN MAINTAINABLE.** — The action for mesne profits does not accrue until possession is given after judgment in ejectment; and from that time only the statute of limitations begins to run. *Murphy v. Guion*, 623.

MISTAKE.

See EVIDENCE, 3.

MORTGAGES.

1. **MORTGAGOR CANNOT REDEEM.** — Where the equity of redemption is sold under a levy of execution, the mortgagor's right to redeem is thereby lost. *Punderson v. Brown*, 53.
2. **REDEMPTION OF PREMISES.** — A mortgagor, to secure a debt due the mortgagee, mortgaged to him two pieces of land by separate deeds; a creditor of the mortgagor levied an execution on the latter's right in one of the pieces; it was held that the creditor was entitled to redeem both, by paying the whole mortgage debt; but could not redeem the piece set off to him on execution, by paying such proportion of the whole debt as that piece bore in value to the whole mortgaged premises. *Franklin v. Gorham*, 86.
3. **ASSIGNMENT OF.** — An assignment of the mortgaged debt without a conveyance of the legal title to the mortgaged premises, is sufficient to entitle the mortgagee to sustain a petition for foreclosure. *Austin v. Burbank*, 119.
4. **DEMAND BEFORE FORECLOSURE.** — Where a mortgage deed was given to secure a bond to the treasurer of the state, with interest payable annually, it was held that any delay of payment of interest was a forfeiture of the bond, and that a petition for foreclosure might be sustained without showing a special demand of the principal. *Id.*
5. **POWER OF SALE SURVIVES.** — A power of sale contained in a mortgage deed, on default of payment, is a power coupled with an interest, and is not revoked by the death of the mortgagor. *Bergen v. Bennett*, 281.
6. **PURCHASE BY.** — A sale under such a power is a species of foreclosure, and the mortgagee may himself make a bona fide purchase of the property. *Id.*

7. **REDEMPTION, WHEN NOT ALLOWED.**—After a lapse of sixteen years from the time of such sale, known to the mortgagor or his heir, and who all this time remained passive, a redemption will not be allowed. *Id.*
8. **AMOUNT RECOVERED BY ASSIGNEE.**—Though the assignment of a mortgage express a consideration exceeding the amount actually paid by the assignee, he cannot recover the excess against the mortgagor, but only the money actually paid and lawful interest will be decreed. *Bush v. Livingston*, 316.
- See DEEDS, 1; EXECUTION, 1; JOINT-TENANCY, 1; USURY, 2.

NEGOTIABLE INSTRUMENTS.

1. **CHECK CONSIDERED A BILL OF EXCHANGE.**—Bank checks are considered as inland bills of exchange, and may be declared on as such. *Cruger v. Armstrong*, 126.
2. **CONSIDERATION.**—The holder of a bank check or bill is *prima facie* the rightful owner, and is not bound to prove a consideration, unless circumstances of suspicion appear. *Id.*
3. **PRESENTMENT FOR PAYMENT.**—The holder of a check is bound to use due diligence in obtaining the money, and must present it and demand payment within a reasonable time. *Id.*
4. **CONSIDERATION.**—The holder of a note, check or bill payable to bearer, need not prove a consideration, unless it is alleged that the possession has been obtained by fraud. *Conroy v. Warren*, 156.
5. **PRESENTMENT OF CHECK.**—A check was drawn in March, 1800, and was not presented until October following. The drawer, after the date of the check, had drawn large sums from the bank, and when the check was presented, payment was refused, because there was no money to meet it. It was held that the drawer was liable, notwithstanding the delay in making presentment, it not appearing that any damage had been sustained by the delay. *Id.*
6. **NOTICE TO INDORSER.**—If the indorser of a note made and dated in New York have a house there, and also one at a short distance in the country, notice of non-payment left at his house in New York is good. *Stewart v. Eden*, 222.
7. **RELEASE OF ONE JOINT-MAKER.**—If a holder of a note release one of several joint-makers, at the same time excepting any liability such maker may have to the indorsers, those indorsers cannot, in an action against them by the holder, set up such release as a discharge. *Id.*
8. **PRESENTMENT FOR ACCEPTANCE AND PAYMENT.**—The indorsee of a bill is bound to present it in a reasonable time, first for acceptance, then for payment, and in case of non-acceptance or non-payment, to give notice thereof in a reasonable time to the indorser. *Pons v. Kelly*, 617.
9. **NOTICE WHEN GIVEN OR EXCUSED.**—The indorsee can never support an action against the drawer without proving the giving of notice, or in case of a non-acceptance of a bill without proving that there were no effects of the drawer's in the drawee's hands; but this proof to excuse a want of notice can only apply to the case of a bill not accepted; it does not apply to an accepted bill or to a promissory note. If the maker

- of a promissory note be insolvent the indorsee must still give notice to the indorser. *Id.*
10. **WHAT DEEMED SUFFICIENT NOTICE.**—As to what shall be deemed sufficient notice, the indorser must have notice from the indorsee that he cannot obtain payment, and that he looks to the indorser for payment. *Id.*
 11. **PROTEST.**—A protest, whether for non-acceptance or for non-payment, is essential in the case of a foreign bill of exchange, in order to charge the drawer or indorser; and where a bill was dishonored on presentment for acceptance, it is not sufficient to protest it for non-payment at maturity. *Fleming v. McClure*, 671.
 12. **NOTICE OF DISHONOR.**—Where a bill drawn in this country on Europe has been dishonored, notice must be sent by the first vessel bound to any part of the United States, and it is not sufficient to send it by the first ship for the port where the drawer and indorser reside. *Id.*
 13. **DUE DILIGENCE.**—Where more than four months elapsed after a bill was dishonored in London, before notice was given to the drawer and indorser in Charleston, it was held that the jury could presume, unless the contrary appeared, that the holder had not used due diligence in giving notice required by the circumstances of the case. *Id.*
 14. **PROMISE TO PAY, WHEN NOT BINDING.**—A promise by a party bound to pay a dishonored bill is no waiver of a want of notice, when it is made in ignorance of the legal effect of the holder's laches. *Id.*
 15. **NOTICE, WHEN UNNECESSARY.**—The bankruptcy of the drawer of a bill of exchange renders it unnecessary to give notice to the indorser of its non-acceptance. *Id.*
 16. **CUSTOM OF MERCHANTS RECOGNIZED.**—The custom of merchants recognized by law in this state, in relation to protests and notices of non-payment of bills of exchange is the same as that in England, and of which judicial notice will be taken. *Id.*

See USURY, 1.

NEW TRIAL

1. **VERDICT AGAINST LAW—SETTING ASIDE VERDICT.**—The defense of usury was made in an action on a promissory note; and the jury were instructed that the note was usurious, and therefore the verdict should be for the defendant. However, the jury found for the plaintiff, and the court set the verdict aside, and granted a new trial. On a second trial, on substantially the same evidence, and against the opinion of the court, a verdict was again given for the plaintiff. The court set aside the latter verdict as against law, and granted a new trial. *Wilkie v. Roosevelt*, 149.
2. **WHEN DENIED.**—The court will not grant a new trial unless it is satisfied injustice has been done; therefore a talesman sworn on the jury, after being struck off the list of special jurors, is no ground for awarding a new trial. *Jordan v. Meredith*, 373.
3. **RULE AS TO GRANTING.**—A new trial, because the verdict is contrary to evidence, ought to be granted only in a case of plain deviation, and not in a doubtful one, merely because the court, if on the jury, would have given a different verdict. *Ross v. Overton*, 552.

4. **JURY CANNOT GIVE VERDICT AGAINST LAW.**—Where the law is clearly on the side of one party, and a verdict given against him, the court will grant a new trial, though several juries have found verdicts for the other. *Murphy v. Guion*, 623.

NUISANCE.

CONSEQUENTIAL DAMAGE OCCASIONED BY NUISANCE.—To support an action on the case for damage sustained by a common nuisance, it is not necessary that the damage should have been direct, it is sufficient if it was consequential. *Hughes v. Hester*, 459.

PARTNERSHIP.

1. **COPARTNERSHIP, ACTION BY.**—An action is not maintainable in favor of a copartnership upon a written contract entered into by one of the partners, deceased, in his individual name only. *Mead v. Tomlinson*, 62.
2. **INDIVIDUAL LIABILITY OF PARTNER.**—If credit be given exclusively to one partner, and it appears that it was not intended that the other should be held or looked to for payment, the latter cannot be made liable. *Smith v. Durrett*, 714.

PATENT.

See FRAUD, 4.

PAYMENT.

HOW APPLIED.—When notes are received by a creditor as a payment, the debtor should be credited with them from the time of receipt, to be applied in the first place to the interest and then to the principal as other payments; otherwise when the creditor makes them his own only by delay. *North v. Mallett*, 622.

PENALTY.

See DAMAGES, 1, 2, 3.

PERJURY.

See CRIMINAL LAW, 4, 5.

PERSONAL PROPERTY.

1. **PROPERTY IN WILD ANIMALS.**—Pursuit alone gives no right of property in animals *feræ naturæ*, and an action will not lie against a man for killing and taking an animal of this kind, pursued by and in view of the person who first found, started, pursued, and was on the point of taking it. *Piercen v. Post*, 264.
2. **SAME—HOW ACQUIRED.**—Occupancy in wild animals can be acquired only by possession, but this possession does not imply actual bodily seizure, but there must be some actual dominion over the animals, as encasing them, or by other such means which will prevent their escape. *Id.*
3. **LAW OF DOMICILE GOVERNS AS TO DISTRIBUTION.**—The personal estate of an intestate, wherever it may be, is to be distributed accord-

ing to the laws of the country where the intestate was a resident, or in other words, where he was a citizen or subject at the time of his death; therefore, slaves in Virginia, which belonged to the estate of an intestate who was a citizen and inhabitant of this state, must be distributed according to the laws of the state wherein he had his domicile, slaves being here regarded as personal property. *Williamson v. Smart*, 638.

PLEADING AND PRACTICE.

1. **TENDER OF DEED.**—Where the plaintiff was bound to give a warranty deed to the defendant, as a condition precedent, it is sufficient to allege in the declaration that he made out and tendered a warranty deed in every way legally authenticated, with a profert, without setting out the deed at length. *Nichols v. Blakelee*, 95.
2. **ALLEGATION AS TO REASONABLE TIME.**—Where an act, which the plaintiff was bound to perform within a reasonable time, is alleged to have been done within a reasonable time, to wit: on or about such a day, it is sufficient after verdict. *Id.*
3. **JOINDER OF CAUSES OF ACTION.**—Though tort and contract cannot be joined in the same declaration, yet where the gist of the action is tort, the declaration will not be held bad because it alleges that the transaction out of which the tort arose has been one of contract. *Steyel v. Westcott*, 109.
4. **SPECIAL AUTHORITY.**—Where a party claims to have acted under a special authority, and his action is founded on such authority, it should be set out with reasonable precision and certainty. *Id.*
5. **PLEADING PRESENTMENT FOR PAYMENT.**—Where a maker of a note cannot be found when it is due, evidence of that fact is sufficient to support the general allegation that the note was presented and payment refused. *Stewart v. Eden*, 222.
6. **ALLEGING PROMISE BY DECEASED INDORSER.**—If the indorser of a note die before it falls due, and the holder, in an action against the executors, allege that the indorser promised to pay, in his life-time, it is fatal, and on such a count no recovery can be had. *Id.*
7. **JOINDER OF CAUSES.**—A charge of slander accompanied by a tortious act may be joined therewith in one count. *Miles v. Oldfield*, 412.
8. **AMENDMENT.**—An amendment will not be allowed, which gives to the plaintiff a new substantive cause of action, and which may take from the defendant the right of pleading the statute of limitations; so the plaintiff will not have leave to change his action for slander into one for malicious prosecution. *Shock v. M'Cheesney*, 415.
9. **SPECIAL DAMAGE SUFFICIENTLY AVERRED.**—The plaintiff declared that he had prepared rafts with intent to navigate them down a river which was constituted a public highway, and that he did navigate them until he came to a dam erected by the defendant, by which he was prevented from passing down the river with his rafts. It was held that this was a sufficient averment of special damage to support an action. *Hughes v. Heiser*, 459.
10. **ALLEGATION OF NOTICE UNNECESSARY.**—Where a party agreed with another that if the latter would take the bond of a third party in payment of a debt, the former should see the money paid; it is not necessary in an action on the agreement, the bond not having been paid, to

aver notice of the non-payment by the maker of the bond. *Austin v. Richardson*, 543.

11. **DATE OF ARBITRATION BOND.**—A variance between the date of the bond declared on and that recited in the award is not fatal, if in other respects they agree; thus, if the bond declared on have the month blank and the award recites the month, it will not be fatal. *Ross v. Overton*, 552.
12. **JOINT PLEA.**—A joint plea may be considered as several, as well as joint, in order to the attainment of justice. *Bevin v. Lingard*, 684.
13. **STATUTE OF FRAUDS NEED NOT BE PLEADED.**—If a defendant choose to avail himself of the statute, it is not necessary that he should by answer confess or deny the parol agreement alleged in the bill, the law having declared it void. *Givens v. Calder*, 686.
14. **DEFECTS CURED BY VERDICT.**—If a declaration contain a substantive cause of action, though informally set forth, it will be aided after verdict. *Miles v. Oldfield*, 412.
15. **GENERAL VERDICT.**—Where a declaration contains several counts, a general verdict may be referred to such of them as will sustain the action; and if one or more of the counts be good, judgment will not be arrested, although the declaration contains one which is bad. *Nelson v. Emerson*, 646.

See DEEDS, 5; MALICIOUS PROSECUTION, 2, 3; SLANDER, 9.

POWERS.

See MORTGAGES, 5, 6.

PRINCIPAL AND AGENT.

1. **LIABILITY OF PUBLIC AGENT ON CONTRACT.**—When an agent is intrusted with the performance of a public duty, he cannot be held personally liable on any contract made by him in pursuance of such duty. *Brown v. Austin*, 11.
2. **LIABILITY OF AGENT ON NEGOTIABLE PAPER.**—A person signed a promissory note in the name of another, as the attorney of the latter, but having no authority from him for that purpose, he was held personally liable on the note to the party who had accepted it under such mistake or imposition. *Dusenbury v. Ellis*, 144.
3. **CONTRACT.**—Where the agent of a corporate body, entered into a contract in his own name, under seal with another person, but in the body of the contract it was stated that the agent contracted in behalf of the corporation; it was held that the agent was not personally liable. *McDonough v. Templeman*, 510.
4. **POWER TO BIND PRINCIPAL.**—A merchant abroad writes to his correspondent here to buy grain on his account, and draw bills on him for the amount; the agent can draw bills only for this specific purpose; and if a third person sells grain to the agent, without dealing with him in that capacity, or to the principal, he cannot recover of the principal on bills drawn on the principal by the agent, at the time of sale, for the purchase-money. *Blane v. Proudfit*, 546.
5. **PRINCIPAL'S LIABILITY.**—The general rule is that to charge the principal, the agency must be proved to be universal, or the dealing must be within the agent's explicit powers. *Id.*

REAL ESTATE.

1. **PAROL AGREEMENT RELATIVE TO SALE OF.**—An agreement made at the time of a sale and conveyance of land, the seller taking the purchaser's note for the consideration that if, on measurement, the land should exceed a certain stated quantity, the purchaser should pay the seller an additional sum therefor, cannot be proved by parol evidence. *Northrop v. Speary*, 48.
2. **CONTRACT FOR SALE OF LAND.**—By articles of agreement for the sale of land, it was agreed that on certain payments at a future day, the vendee should receive a deed; and further stated that for the consideration therein expressed, the vendor "grants, bargains and sells" a certain tract of land. Bonds were given for the purchase-money. It was held that this was not sufficient to divest the legal estate. *Sherman v. Dill*, 408.
3. **PARTIAL POSSESSION OF LAND CONVEYED.**—A party being in possession of a part of a tract of land, under a deed conveying to him the whole tract, may grant the whole by a deed of bargain and sale, without entering on that part of which he is not in possession, notwithstanding an adverse possession of the said part by inclosure. *Gittings v. Hall*, 502.
4. **MISREPRESENTATION AS TO BOUNDARIES.**—Where the vendor of land misrepresents the location of its boundaries to the vendee at the time of the sale, the sale will be set aside in equity, notwithstanding the representation was innocently made. *Bibb v. Prather*, 711.

See FRAUD, 5, 7.

REMAINDER.

1. **PERSONAL PROPERTY.**—Personal property may be limited over by way of a remainder in a will. *Griggs v. Dodge*, 82.
2. **CREATED BY WILL.**—A testator devised one-third part of his estate, consisting mostly of personal property, to his wife for her use and benefit so long as she should remain his widow, and then devised the whole of the estate to his children. It was held that this was sufficient to create a remainder over. *Id.*
3. **ACCOUNTING.**—After the termination of the particular estate by the marriage of the widow, an account will lie to recover the property limited over. *Id.*

RIOT.

See CRIMINAL LAW, 9.

SHERIFF.

1. **WHEN A TRESPASSER.**—If a deputy sheriff enter the house of an administrator to find goods of an intestate whereon to levy, and afterward proceed to levy on the goods of the administrator, from whom nothing is due, he is a trespasser *ab initio*. *Hazard v. Israel*, 438.
2. **LIABILITY FOR ACTS OF DEPUTY.**—The sheriff's officers being his known and recognized deputies, he will therefore be held liable civilly for their misconduct in the execution of a writ. *Id.*
3. **EXEMPLARY DAMAGES.**—A jury may properly award exemplary damages against a sheriff for the misconduct of his deputy. *Id.*

SHIPPING.

1. **GOODS ON DECK.**—No contribution is allowed for goods shipped on deck, and which had been thrown overboard, nor is the owner of the vessel liable as a carrier for the value of such goods. *Smith v. Wright*, 162.
2. **CHARTER CONTRACT.**—When a vessel chartered for a voyage becomes disabled by an accident while loading the cargo, the freighter will not be bound by the charter contract, unless she is repaired and rendered fit for the voyage within a reasonable time, of which the jury are the proper judges. *Purvis v. Tanno*, 664.
3. **MASTER AGENT OF OWNER.**—The master is the agent of the owner, who is liable for his defaults, although the whole vessel is chartered; unless the charterer engage the master and seamen, so that the hull only belongs to the owners. *Id.*

SLANDER.

1. **WORDS ACTIONABLE PER SE.**—Saying of a drover, whose business it is to purchase cattle, drive them to market and sell them, that he is a bankrupt, is actionable without special damage being proved. *Lewis v. Hawley*, 121.
2. **WORDS ACTIONABLE.**—An action for slander is not maintainable for saying one is forsworn, but it is otherwise when it is said that he is perjured. *Hopkins v. Beedle*, 191.
3. **GENERAL VERDICT.**—In an action for slanderous words, if those in some counts be actionable, and those in others not, and entire damages be given, judgment will be arrested. If the plaintiff apply, he may, on the payment of costs, have a *venire de novo*. *Id.*
4. **WORDS ACTIONABLE.**—Saying to another: "You swore to a lie, for which you now stand indicted," is actionable. *Pelton v. Ward*, 251.
5. **PLEADING IN ACTION.**—If, in an action for slander, a count be insufficient, and the declaration do not contain any introductory matter or colloquium by reference to which the charge can be made certain, the defect in the count cannot be overcome by a justification and confession of the words in bar. *Id.*
6. **MITIGATION OF DAMAGES.**—In an action for slanderous words, the defendant may give in evidence on the general issue, in mitigation of damages, the manner and circumstances of speaking the words, and that they were in circulation, and reported by others, and that he only repeated them. *Cook v. Barkley*, 343.
7. **PROOF.**—It is sufficient if the plaintiff proves that the defendant spoke words substantially the same as those laid in the declaration, and the precise words need not be proved. *Hersh v. Ringwalt*, 392.
8. **JUSTIFICATION.**—If one assert a slander generally, without stating his author, it is actionable; but if he mentions, at the time, his authority, it should be such an authority as would induce reasonable belief. *Id.*
9. **DAMAGE.**—If no special damage is laid, proof of particular damage will not be received. *Id.*
10. **WORDS ACTIONABLE.**—The words "You are a vagrant," are actionable, as a statute subjects such a person, on a conviction before a justice of the peace, to imprisonment at hard labor, for a term not exceeding one month. *Miles v. Oldfield*, 412.

11. **WHEN ACTION WILL NOT LIE.**—Slander will not lie for words charging a crime uttered before a justice of the peace, in consequence of which the plaintiff was bound over, but discharged without an indictment having been preferred. *Shock v. McChesney*, 415.
12. **WORDS ACTIONABLE.**—To call a clergyman a drunkard is actionable, because these words, if believed, must deprive him of that respect, veneration and confidence, without which he can expect no hearers as a minister of the gospel. *McMillan v. Birch*, 426.
13. **WORDS, WHEN PRIVILEGED.**—Words spoken of the plaintiff before a presbytery of the presbyterian church in the course of his defense against charges for which he had been summoned there by the plaintiff, are not actionable, provided he does not designedly and maliciously wander from the point for the purpose of slander. *Id.*
14. **ASSESSMENT OF DAMAGES.**—Where entire damages are assessed upon several counts in an action of slander, one of which is bad, the judgment will be reversed and a *venire de novo* awarded. *Shafer v. Kintner*, 488.
15. **WORDS NOT ACTIONABLE.**—Saying of a man "he has sworn false," is not actionable, the colloquium being of an extra-judicial affidavit before a justice of the peace; nor are the words helped by an innuendo of perjury. *Id.*

SPECIFIC PERFORMANCE

1. **UNDER PAROL AGREEMENT.**—Payment of the consideration, possession, and the making of improvements, will take a case out of the statute of frauds, and are sufficient for a decree for specific performance. *Wetmore v. White*, 323.
2. **PAROL AGREEMENT DENIED.**—A specific performance of a parol agreement for the sale of land, will not be decreed against the heir of the vendor, though he had given instructions in writing, stating the terms to an attorney to draw the deeds of conveyance. *Givens v. Calder*, 686.
3. **SPECIFIC PERFORMANCE.**—Where the complainant seeking specific performance of a contract for the sale of land, has failed to perform a precedent condition on his part, the court will not decree specific performance, if any injury has resulted to defendant for such non-performance; but the defendant having taken possession of the land, and paid part of the purchase-money, and executed the agreement in part, the court will consider him as having waived his objections to the complainant's default, and will decree a specific performance of the contract. *Ramsay v. Brailsford*, 698.
4. **SALE OF LAND.**—A court of equity will not enforce the specific performance of a contract for a conveyance of land, which has been brought about by fraud or mistake, or which has been attended with hardship occasioned by the delay of the complainant in performing his part of the contract. *Meaux v. Helm*, 716.
5. **SAME.**—Where a party bought a tract of land, and agreed to pay for it in forty days, in continental currency, which he knew was depreciating rapidly, and would soon become worthless, of which depreciation the vendor was not fully informed, and the vendee delayed payment for a number of years, and until the currency became worthless, it was held

that a court of equity should not decree a conveyance of the land at the instance of the vendee or his assignee. *Id.*

6. **SAME—RELIEF IN EQUITY.**—Where the vendor, in a contract for the conveyance of real estate, died, and a bill was brought against his heirs for a specific performance, the fact of the vendor's executor having obtained a judgment for the purchase-money will not be considered such a confirmation as will bind the heirs to a specific performance of a hard and unconscionable bargain; and the contract and judgment should be set aside upon equitable terms. *Id.*

STATUTES.

1. **PLURAL TERM CONSTRUED.**—Under a statute which declares that the larceny of bills obligatory shall be punished in the same manner as the larceny of any goods or chattels; the felonious taking, etc., of one such bill is punishable as a larceny. *Commonwealth v. Messenger*, 441.
2. **CONSTRUCTION NOT TO BE DISTURBED.**—Where the construction given to a statute has long been acquiesced in, it ought not to be disturbed. *Commonwealth v. Posey*, 560.

See **CONTRACTS**, 5; **CRIMINAL LAW**, 7.

STATUTE OF FRAUDS.

1. **PAROL AGREEMENT TO ANSWER FOR ANOTHER'S DEFAULT.**—A. sold and converted goods to his own use which he had undertaken to transport to a place of destination. The owner being about to institute a suit against him for damages, B., the father of A., promised the owner, by parol, that if he would forbear to sue A., and would institute a suit against C. and should fail to recover, he would pay the damages. The owner did, accordingly, forbear to sue A., and instituted suit against C., but failed to recover. It was held that this promise of B. was within the statute of frauds. *Turner v. Hubbell*, 115.
2. **PARTITION BY PAROL NOT WITHIN STATUTE.**—A parol partition made between tenants in common, by marking a line of division on the ground, and followed by a corresponding separate possession, is good, and not within the statute of frauds. *Ebert v. Wood*, 436.
3. **PAROL CONTRACT BY AGENT FOR SALE OF LANDS.**—Where the statute of frauds enacted in a state omitted the English provision that no action should be brought to recover damages on any contract for the sale of land, unless the agreement shall be in writing, and signed by the party to be charged therewith, or by some other person by him lawfully authorized, it was held that a parol contract for the sale of land was valid, so as to support an action for damages, though made with an agent who had merely parol authority. *Ewing v. Tees*, 455.
4. **INSUFFICIENT WRITTEN AGREEMENT.**—Where deeds were drawn, and the vendor took them home and wrote to the vendee that the deeds were ready, and requested her to attend and settle the business, but he died before the parties met, it was held not to be such an agreement in writing as will take the case out of the statute of frauds, as the letter did not distinctly set forth the terms of the agreement, or refer to a written instrument in which they are set forth, and that the party accepted such terms. *Givens v. Calder*, 686.

- 1. PART PERFORMANCE INSUFFICIENT.**—The person contracting to purchase, having deposited part of the purchase-money with her agent, to pay the vendor as soon as he executed the deed, and the agent informing the vendor of it is not such a performance as takes the case out of the statute; nor does the purchaser taking possession of the land, without any known permission of the vendor, make such a part performance. *Id*

See PLEADING, 13.

STATUTE OF LIMITATIONS.

- 1. PLEA OF.**—Where a contract is sought to be enforced in a state other than that in which it was made, the defendant may plead the statute of limitations of the former, as a bar to the action. *Nash v. Tupper*, 197.
- 2. SAME—WHEN NO BAR.**—The statute of 21 James I, ch. 16, being in force in Maryland, and the words “beyond seas” therein being synonymous with the words “out of the state,” therefore a non-resident of the state, but who is a resident of one of the United States, is not barred by the statute of limitations in an action of ejectment. *Pancoast v. Addison*, 521.
- 3. PROMISE BY ADMINISTRATOR.**—Where one of two administrators said, when a note of his intestate was presented to him: “It is the signature of the deceased, and all his just debts shall be paid when the Holly Shelter lands shall be sold,” this was held sufficient to take the case out of the statute of limitations. *Cobham v. Administrators*, 612.

STOPPAGE IN TRANSITU.

- RIGHT OF.**—A vendor delivered to the vendee a bill of parcels for goods lying in a public store, together with an order on the store-keeper for their delivery; it was held that the vendor had not the right of stoppage *in transitu* against a person purchasing *bona fide* for a valuable consideration. *Hollingsworth v. Napier*, 268.

SURETYSHIP.

- 1. RECOVERY AGAINST PRINCIPAL.**—A surety is entitled to recover from his principal for money paid by the surety on behalf of the principal on a usurious contract made by the principal, and although the latter might have avoided such contract. *Ford v. Keith*, 4.
- 2. DISCHARGE.**—Where a surety bound himself to make good a deficiency arising from a sale of goods consigned to the correspondent of the creditor who had entire control of the consignment, a sale by the consignee at another place than that agreed on releases the surety. *Ludlow v. Simond*, 291.
- 3. CONFESSION OF PRINCIPAL.**—In a suit against a surety on a recognizance for the good behavior of his principal, the confession of the latter that he had published certain libels may be given in evidence, but not the admissions of counsel for the principal in a former trial, nor can the verdict and judgment in the former trial between different parties be received in evidence against the surety. *Respublica v. Davis*, 366.
- 4. RELEASE.**—If the creditor extend the credit to a longer period against the will of the surety, the latter will be discharged; but it must appear

that such credit was given either expressly or impliedly against his consent or inclination, or that he was prejudiced thereby. *Butler v. Hamilton*, 692.

5. **SAME.**—A surety on certain bonds is not released merely on the creditor not urging his demand. There must be an express extension of credit to the principal. If one of the bonds has been prosecuted to judgment and an execution returned *nulla bona*, there is, therefore, less necessity to sue on the others. *Id.*

TENDER.

WHAT IS.—It is not a legal tender to say: "Here I am ready," the tenderer must have the money ready also. *North v. Mallett*, 622.

TRESPASS.

1. **WHEN WILL NOT LIE AGAINST OFFICER.**—The theater of the plaintiff was assessed by the assessors under an act of congress, but erroneously as a dwelling-house; a tax collector executed a warrant of distress under such assessment. It was held that an action of trespass did not lie against him as a ministerial officer for executing such warrant. *Henderson v. Brown*, 164.
2. **ACTION AFTER RECOVERING MESNE PROFITS.**—A recovery of mesne profits is no bar to an action of trespass *quare clausum fregit*; therefore, the removal of fence rails is a trespass, and for which damages may be recovered in an action of trespass *quare clausum fregit*, notwithstanding a recovery in an action for mesne profits, unless such removal was necessary for the use and occupation of the land. *Gill v. Cole*, 527.

See DAMAGES, 6; EXECUTORS, 1.

TROVER.

RIGHT TO MAINTAIN.—The plaintiff to maintain an action of trover, must appear to be entitled to the thing in question, and to be in the actual and constructive possession thereof, at the time of the conversion. *Gage v. Allison*, 682.

TRUSTEES.

1. **ALLOWANCES TO.**—A trustee is entitled to interest on advances made for the use of the *cestui que trust*. He is also entitled to an allowance for depreciated money paid him for rent of the trust estate; for expenses incurred in erecting necessary and proper buildings, although the *cestui que trust* was not consulted. *Dilworth v. Sinderling*, 469.
2. **SELECTION OF.**—Where there is no bankrupt act existing, a debtor may properly select his own trustee, and such trustee or assignee need not necessarily be one of the creditors. *Wilt v. Franklin*, 474.

See EXECUTORS, 3.

USAGE.

UNREASONABLE.—The usage of plasterers to charge half the size of the windows, at the price agreed on, for work and materials is unreasonable and bad. *Jordan v. Meredith*, 373.

USURY.

1. **PROMISSORY NOTE VOID.**—If a promissory note is given for a usurious contract, it is absolutely void, even in the hands of an innocent holder, who has received it in the fair and regular course of trade, without knowledge of the usury. *Willie v. Roosevelt*, 149.
2. **ASSIGNMENT OF MORTGAGE IMPEACHED.**—A security made on a good and *bona fide* consideration cannot be made invalid by a reason of a subsequent usurious assignment. Hence, if a mortgage be assigned to a third person, who pays the amount due thereon to the mortgagee, the mortgagor cannot avoid it in the hands of such person, on account of an agreement to pay him a sum exceeding the money paid and legal interest. *Bush v. Livingston*, 316.

VERDICT.

See NEW TRIAL, 1, 3, 4; PLEADING, 14, 15.

WARRANTY.

1. **IMPLIED, AS TO LAND.**—The doctrine of implied warranty applies only to articles susceptible of a standard quality, or which are sold by samples, and does not extend to lands which have no standard quality. *Pollard v. Lyman*, 64.
2. **NOT IMPLIED IN SALE OF GOODS.**—In an action on the case for selling one article for another, there must be either an express warranty or fraud on the part of the vendor. A sound price does not imply a warranty of soundness, nor does a description of goods in a bill of parcels amount to a warranty. *Seixas v. Woods*, 215.
3. **WHEN NOT IMPLIED.**—A vendor of rice sold here is not liable under an implied warranty for a defect in its quality or soundness which is not discovered until its arrival abroad, and which, if it existed at the time of sale, might easily have been detected by an examination. *Vanderhoest v. MacTaggart*, 667.

See CONTRACTS, 1; COVENANTS, 1.

WASTE.

WHAT CONSTITUTES.—Waste, in this country, is not to be defined by the rules in the English law in all respects, and from the situation of this country the cutting of timber for the purpose of clearing the land is not waste. What shall be deemed waste, must, in a considerable degree, be left to the jury upon the evidence; but if trees be cut not for the sake of clearing the land, but for sale, it is waste. *Ward v. Shepard*, 625.

WATER-COURSES.

1. **USE OF.**—A riparian owner on the upper bank of a public river is not liable for building thereon and using the water, in an action by another who had long before had a beneficial use of the water, unless manifest and serious damage result from the use or enjoyment. Hence an action will not lie for diverting the water of a river from its usual course, by erecting a dam for mills above the mills of another, if sufficient water be left to work the lower mills, though in consequence of

such erection it be necessary to run the mill-dam of the lower mills further into the stream, and the difficulty of getting logs to the lower mills be increased so much as to require additional labor. *Palmer v. Mulligan*, 270.

2. RIVER AS A PUBLIC HIGHWAY.—That portion of the Hudson river where the tide does not ebb and flow, may be held and enjoyed as private property; but it is so far a public river as to be subject to a use as a public highway. *Id.*
3. AGREEMENT FOR USE OF.—If a stream of water be owned by two persons whose lands are on opposite sides, and they agree to erect mills on the land of one and turn the whole stream to the mills, it will be an appropriation of the water to the mills; and whether held jointly or in common, a release of the interest of one tenant in the mills will carry with it his right to the water. *Wetmore v. White*, 323.
4. USE APPURTENANT.—By a sale of mills the water of the race-way will pass as an incident of the property. *Id.*
5. BED OF NAVIGABLE RIVER.—The ownership of the bed of a navigable river is in the commonwealth, and cannot be the substance of private grant. *Home v. Richards*, 574.
6. RIVER NOT NAVIGABLE.—In a river not navigable, the owner of the soil on one side is the proprietor of the bed to the middle of the stream. *Id.*

WILLS.

1. EXCLUSION OF CHILD FROM SHARE IN TESTATOR'S ESTATE.—Where a testator in his will makes such an allusion to a child as to show that he had not forgotten to consider such child in the distribution of his estate, it will be sufficient to exclude such child from a distributive share in the estate of the testator, and it is not necessary that the child should have a legacy in the will. *Terry v. Foster*, 6.
2. PUBLICATION.—Where a person, who was old and infirm, had submitted to him an instrument in writing, which he signed, and which was attested by three subscribing witnesses at the same time, but neither the deceased nor the witnesses gave any intimation at the time that the paper so signed was a will, it was held that there was no publication of the will in this case. *Swett v. Boardman*, 16.
3. COMPETENCY OF WITNESSES.—The inhabitants of an incorporated society, to whom property is devised for the support of a school, are competent witnesses to attest the will. *Cornwell v. Isham*, 50.
4. FEE WHEN VESTED.—A testator devised the use and improvement of all his real estate to his wife until his son should arrive at the age of twenty-one years, she bringing him up, and then devised to his son the whole of his real estate, except the use and improvement as aforesaid, it was held that a fee vested in the son, subject to a personal trust or confidence in the mother, immediately on the death of the testator. *Everts v. Chittendon*, 97.
5. CONSTRUCTION OF.—Every sentence and word in a will must be considered in forming a judicial opinion on it. *Turbett v. Turbett*, 369.
6. MEANING OF WORD "ESTATE."—The word estate in a will carries everything, unless restrained by particular expressions. *Id.*
7. LAW GOVERNING AS TO PERSONAL PROPERTY.—A will of personal property not executed in conformity to the law of the testator's domicile

at the time of his death, will not be operative in regard to personal property in a foreign country, although executed according to the laws of that country. *Desobats v. Berquier*, 448.

8. **RESIDUARY DEVISE.**—A testator bequeathed to his wife certain slaves during her natural life, and after specific devises of lands and slaves to his two sons, devised as follows: "All the rest of my estate I leave at the time of my death, I desire may be equally divided between my beloved wife and my dear sons, and their heirs forever." This residuary clause vested in the wife and sons equally the reversion in the slaves given to her for life; and, therefore, on her remarriage, her husband became entitled absolutely to one-third of those slaves, and their increase. *Read v. Payne*, 550.
9. **SAME.**—A testator directed that his executors should petition the legislature to emancipate his slaves; that in case they should not be able to carry out this provision of the will, he then devised part of the slaves to a certain legatee, and the rest of them, and "all his other property," to certain relations. This was held an absolute disposition of the residuum, and not a devise upon a contingency. *Mayo v. Carrington*, 580.
10. **CONSTRUCTION OF "ALL HIS OTHER PROPERTY."**—A residuary devise of "all his other property," comprehended lands as well as personalty, for the mention of slaves did not restrict the bequest, and the words "all his other property," carried a fee in the lands. *Id.*
11. **UNDUE INFLUENCE IN MAKING.**—Where any influence has been used to induce the execution of a will, the jury should decide whether it was by fair and reasonable means, or by unfair and fraudulent ones; in the former case they should find in favor of the will, in the latter against it. *Eelbeck v. Granberry*, 624.
12. **SIGNATURE AND ATTESTATION.**—The signing of a will may be proved by proof that the testator acknowledged it, although the name, or signature, or handwriting was not before him, and though the paper lay at a distance on the table. And the witnesses may attest at different times, so it be in the presence of the testator. *Id.*

See EVIDENCE, 17.

WITNESS.

See EVIDENCE, 1, 4, 9, 22.

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